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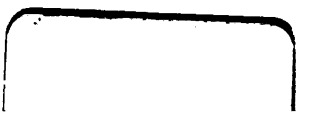

CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES,

FOR THE

SEVENTH JUDICIAL CIRCUIT.

BY

JOSIAH H. BISSELL,
OF THE CHICAGO BAR,
OFFICIAL REPORTER.

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JUDGES,

SITTING IN THE SEVENTH CIRCUIT DURING THE PERIOD COVERED BY THIS VOLUME.

HON. DAVID DAVIS,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.
Allotted to the Seventh Circuit. Appointed December 8, 1862.

HON. THOMAS DRUMMOND,
CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT.
Appointed December 22, 1869. District Judge since February 19, 1850.

HON. ANDREW G. MILLER,
DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WISCONSIN.
Appointed June 12, 1848.

HON. SAMUEL H. TREAT,
DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ILLINOIS.
Appointed March 3, 1855.

HON. WALTER Q. GRESHAM,
DISTRICT JUDGE FOR THE DISTRICT OF INDIANA.
Appointed December 21, 1869.

HON. HENRY W. BLODGETT,
DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS.
Appointed January 11, 1870.

HON. JAMES C. HOPKINS,
DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WISCONSIN.
Appointed July 9, 1870.

32036

TABLE OF CASES.

A.

Akerly *vs.* Vilas 332
Amory *vs.* Amory 266

B.

Blake *vs.* Eagle Works Manufacturing Co. 77
Block 121, United States *vs.* 208
Boggs *vs.* Willard 256
Burnham, Upton, Assignee, *vs.* 431
Burnham, Upton, Assignee, *vs.* 520

C.

Carter, *In re* 195
Chicago, Burlington and Quincy R. R. Co., Seymour *vs.* ... 43
Chicago Manufacturing Co., Dane *vs.* 380
Chicago and Northwestern R. R. Co., Sayles *vs.* 52
City of Chicago, Union National Bank *vs.* 82
City of Madison, Nelson *vs.* 244
Collins, *In re* 415
Commissioner of Patents, Marsh *vs.* 321
Cook and Gleason, *In re* 116
Cook and Gleason, *In re* 122
Cross, Dennis *vs.* 389

D.

Dane *vs.* Chicago Manufacturing Co. 380
Dane *vs.* Illinois Manufacturing Co. 374
Denike *vs.* Rourke 39
Dennis *vs.* Cross 389
Drake *vs.* Rollo, Assignee 273

E.

Eagle Works Manufacturing Co., Blake *vs.* 77
Eclipse, The 99
Einstein, Jenkins, Assignee, *vs.* 128
Emery, Nusbaum *vs.* 469
Ess and Clarendon, *In re* 301
Ex parte Norwood 504

F.

Firemen's Insurance Co., *In re* 462

G.

Gaughan *vs.* Northwestern Fertilizing Co. 485
Germania Ins. Co. *vs.* LaCrosse and Minnesota Packet Co. 501
Goodall, Assignee, *vs.* Tuttle 219

H.

Hall, Assignee, etc. *vs.* Wager 28
Hansbrough, Upton, Assignee, *vs.* 417
Harris, Ripley *vs.* 199
Heller, *In re* 153
Hickey, Putnam *vs.* 157
Hitchcock *vs.* Rollo, Assignee, etc. 276
Hoag, Sawyer, Assignee, *vs.* 293
Hovey, Milligan *vs.* 13
Hoyt, *In re* 486

I.

Illinois Central R. R. Co., Turrill *vs.* 66
Illinois Central R. R. Co., Turrill *vs.* 72
Illinois Manufacturing Co., Dane *vs.* 374
In re Carter 195
In re Collins.....415
In re Cook and Gleason 116
In re Cook and Gleason 122
In re E. R. Stephens.....187
In re Ess and Clarendon 301
In re Firemen's Insurance Co. 462
In re Heller 153
In re Hoyt 436
In re Kahley 169
In re Kinkead 405
In re Lake 204
In re McGilton 144
In re Merchants' Insurance Co. 162
In re Munn 442
In re Noonan.....491
In re Republic Insurance Co. 452
In re Sands Ale Brewing Co. 175
In re Skelley 260
In re Strachan 181
In re Wright 359

J.

Jenkins, Assignee, *vs.* Einstein 128

K.

Kahley, *In re*.....169
Kellogg *vs.* LaCrosse and Minnesota Packet Co.....496

Kenosha and Rockford R. R. Co. *vs.* Sperry 309
Kingsbury *vs.* Kingsbury 60
Kinkead, *In re* 405

L.

Lac La Belle, The 313
LaCrosse and Minnesota Packet Co., Kellogg *vs.* 496
LaCrosse & Minnesota Packet Co., Germania Ins. Co. *vs.* .. 501
Lake, *In re* 204

M.

Mallory, Rafferty *vs.* 362
Marsh *vs.* Commissioner of Patents 321
Marsh *vs.* Northwestern National Insurance Co. 351
McGilton, *In re* 144
Merchants' Isurance Co., *In re* 162
Milligan *vs.* Hovey 13
Monitor and Hill, The 24
Munn, *In re* 442

N.

Nelson *vs.* City of Madison 244
Newman, Turner *vs.* 307
Noonan, *In re* 491
Northern Transportation Co., VanSchaack *vs.* 394
Northwestern Fertilizing Co. *vs.* Town of Hyde Park 480
Northwestern Fertilizing Co., Gaughan *vs.* 485
Northwestern National Insurance Co., Marsh *vs.* 351
Norwood, *Ex parte* 504
Nugent *vs.* Putnam County 105
Nusbaum *vs.* Emery 469

O.

Ocean Wave, The....317

P.

Portsmouth Savings Bank *vs.* Town of Yellow Head....474
Putnam *vs.* Hickey....157
Putnam County, Nugent *vs.*....105

R.

Rafferty *vs.* Mallory....362
Railway Passenger Assurance Co., Tooley *vs.*....399
Republic Insurance Co. *vs.* Williams....370
Republic Insurance Co., *In re*....452
Ripley *vs.* Harris....199
Rollo, Assignee, etc., Drake *vs.*....273
Rollo, Assignee, etc., Hitchcock *vs.*....276
Rourke, Denike *vs.*.... 39
Ruggles *vs.* Simonton....325

S.

Sands Ale Brewing Co., *In re*....175
Sawyer *vs.* Hoag, Assignee....293
Sayles *vs.* Chicago and Northwestern Railroad Co.... 52
Selt, The....344
Seymour *vs.* Chicago, Burlington and Quincy R. R. Co... 43
Simonton, Ruggles *vs.*....325
Skelley, *In re*....260
Sperry, Kenosha and Rockford R. R. Co. *vs.*....309
Stephens, E. R., *In re*....187
Strachan, *In re*....181

T.

The Eclipse 99
The Lac La Belle..... 313
The Monitor and Hill 24
The Ocean Wave 317
The Selt 344
The Virginia..... 48
Tooley *vs.* Railway Passenger Assurance Co. 399
Town of Hyde Park, Northwestern Fertilizing Co. *vs.* ... 480
Town of Yellow Head, Portsmouth Savings Bank *vs.*..... 474
Turner *vs.* Newman..... 307
Turrill *vs.* Illinois Central R. R. Co..... 66
Turrill *vs.* Illinois Central R. R. Co..... 72
Tuttle, Goodall, Assignee, *vs.*..... 219

U.

Union National Bank *vs.* City of Chicago..... 82
United States *vs.* Block 121 208
Upton, Assignee, etc. *vs.* Burnham..... 431
Upton, Assignee, etc. *vs.* Burnham..... 520
Upton, Assignee, etc. *vs.* Hansbrough..... 417

V.

VanSchaack *vs.* Northern Transportation Co. 394
Vilas, Akerly *vs.*..... 332
Virginia, The 48
Vocke, Assignee, *vs.* Yaeger..... 300

W.

Wager, Hall, Assignee, etc. *vs.*..... 28
Willard, Boggs *vs.*..... 256
Williams, Republic Insurance Co. *vs.*..... 370
Wright, *In re*..... 359

Y.

Yaeger, Vocke, Assignee, *vs.* 300

CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

SEVENTH JUDICIAL CIRCUIT.

MILLIGAN vs. HOVEY.

CIRCUIT COURT.—DISTRICT OF INDIANA.—MAY TERM, 1871.

MILITARY COMMISSIONS.

1. WHEN UNCONSTITUTIONAL.—Military commissions and their acts, in the trial of persons not in the military service, during the late civil war, in states where the courts were undisturbed, were unconstitutional.

2. LIABILITY OF MEMBERS AND OF ARMY OFFICERS.—The members of such commissions, and officers of the United States army, are liable for arrest and imprisonment ordered by them in such states, even though ratified and approved by the Executive Department of the Government.

3. They are also liable for imprisonment suffered beyond their jurisdiction, if such imprisonment was the natural and necessary result of the sentence pronounced by them.

4. LIMITATION OF ACTION.—The limitation imposed by the act of Congress of March 3, 1863, was within the power of Congress, and binding upon state tribunals.

5. The defendants are not liable for any acts, nor any portion of the term of imprisonment, prior to two years before the commencement of the action; the statute begins to run notwithstanding that the imprisonment was a continued act.

6. *It seems* that an act of Congress would not be complete justification, if the trial by a military commission was forbidden by the Constitution.

7. DAMAGES.—The damages to be allowed should be compensatory, and not exemplary or punitive.

8. The action of military commissions, and duties of army officers, commented on.

This was an action of trespass, by Lambin P. Milligan, for an alleged wrongful arrest and imprisonment. The principal facts which gave rise to the controversy were undisputed.

On the 5th of October, 1864, during the rebellion, the plaintiff was a citizen of Indiana, residing in the county of Huntington, and not engaged in the military or naval service of the United States. General Hovey, one of the defendants, was the military commander of the District of Indiana, duly appointed by the President. On that day General Hovey, as such commander, ordered an officer and some soldiers to proceed to Huntington and arrest the plaintiff. He was accordingly arrested at his house there and brought to Indianapolis, and confined in prison. He was shortly after tried before a military commission on certain charges brought against him for conspiring against the Government, affording aid and comfort to the enemy, inciting insurrection, disloyal practices, and violation of the usages of war. The commission convicted him and sentenced him to be hanged. His imprisonment was continued under this sentence at Indianapolis till the 2d day of June, 1865, when, a commutation having been made in the sentence by the President, General Hovey ordered the plaintiff to be removed to the penitentiary of Ohio, at Columbus, in compliance with instructions from the War Department, where he remained till the 10th of April, 1866, when he was liberated.

In the meantime, on the 10th of May, 1865, the plaintiff had made application to this Court for a writ of *habeas corpus*,

upon which the opinions of the judges were divided, and the questions certified to the Supreme Court, under the act of Congress of April 29th, 1802. That Court, after elaborate argument and consideration, held that the military commission had no jurisdiction to try and sentence the petitioner, and ordered the writ to issue according to the prayer of the petitioner, and that he be discharged from custody. *Ex parte Milligan*, 4 Wallace, 2.

It was for these acts thus done by General Hovey as military commander, by other defendants as members of the military commission, and by others as having some agency in his arrest, trial and imprisonment, that the action was brought, although the plaintiff simply set them out as a wrongful arrest and imprisonment, without stating the reasons which influenced the defendants.

The defendants pleaded:

1. Not guilty.

2. That the arrest and imprisonment grew out of the plaintiff's participation in the offenses charged against him before the military commission; that he was guilty thereof, and that the defendants were acting as officers in the army of the United States, under the authority of the President, without malice, and with no more force than necessary.

3. That for all acts done prior to the 13th of March, 1866, the limitation of two years prescribed by the seventh section of the *habeas corpus* act of Congress of March 3, 1863, applies, the suit having been brought on the 13th of March, 1868; and the defendants say as to the imprisonment after March 13, 1866, they are not guilty.

T. A. Hendricks, for plaintiff.

J. W. Gordon and *Benjamin Harrison*, for defendants.

Drummond, J., after stating the facts, charged the jury as follows:

The agency of most of the defendants in the arrest and

imprisonment of the plaintiff is not seriously controverted. The arrest was made on the order of General Hovey, and by him he was held for military trial.

The defendants Spooner, Dehart, Bennett, Murray, and Williams, were members of the military commission that tried and convicted him, and it was in consequence of their action that he was still retained in prison. If they had acquitted him it is a fair inference he would have been released, unless, indeed, other charges were preferred against him. This being the case on the part of the plaintiff, we now proceed to consider the defense.

However it may have been before the arrest and trial, there is no doubt that the acts of General Hovey and his brother officers, in the seizure, trial and sentence of the plaintiff, were ratified and approved by the Executive Department of the Government.

The legislation of Congress has also been to the same effect, (§4, act of March 3, 1863, 12 U. S. Statutes at Large, 756; § 1, act of May 11, 1866, 14 do. 46; act of March 2, 1867, *Id.* 432; Statutes of Indiana, Davis' Supplement, Vol. 3, p. 570).

The first question, therefore, is whether this constitutes a good defense.

The Supreme Court of the United States decided upon the facts then before it that the action of the military commission in the trial and sentence of the plaintiff was null and void. (4 Wallace, 2.) The court also decided that in the trial and sentence the constitutional rights of the plaintiff were invaded; that is, the act done was prohibited by the Constitution of the United States. A majority of the court held that even Congress could not authorize the act. If an act is prohibited by the Constitution, and it is beyond the power of Congress to authorize it, then it may be said the wrong done by the act is not subject to complete indemnity by Congress, because then the prohibition of the Constitution to protect private rights would be without effect. (4 Wallace, 136.) As the minority

of the judges of the Supreme Court in the Milligan case held that the trial and sentence might have been legal if Congress had authorized military commissions, then I think it is fairly to be inferred that in their opinion Congress could give indemnity for the same, although the trial was illegal at the time for want of an act of Congress. I have preferred to rule, for the purposes of this trial, that an act of Congress would not be a complete justification if the military trial was forbidden by the Constitution.

This question is undoubtedly of great importance, and it has been reserved for future consideration. It is for this reason that the second defense is placed on the ground that there was martial law, suspension of the privilege of the writ of *habeas corpus*, and war and military operations in Indiana at the time of arrest. Under the present ruling of the court, proof of this last averment is essential to the validity of the defense. In the case presented to the Supreme Court it was assumed that there was at the time no war in Indiana, and it was declared that no usage of war could sanction a military trial there for any offense of a citizen not connected with the military service. But in this case the defendants have been permitted to aver and give evidence touching a state of war before, at and after the arrest of the plaintiff. Under what condition of affairs would the law have given validity to the commission that tried the plaintiff? This question is answered by the Supreme Court of the United States in the case so often referred to. These are some of the principles stated by that court: "Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, *such as effectually closes the courts and deposes the civil administration.*"

"There are occasions when martial law can be properly applied. If in foreign invasion or civil war *the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations where war really prevails*, there is a necessity to

furnish a substitute for the civil authority thus overthrown. * * * As necessity creates the rule, so it limits its duration, for if this [military] government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction; it is also confined to the locality of actual war."

Does the evidence before the jury bring this case within the conditions named?

We know judicially, and therefore it is proved, that the Federal Courts of Indiana were open during the time the events occurred which have given rise to this controversy. Cases, both civil and criminal, were tried, and rights of person and property determined. A part of the state had been invaded in July, 1863, but that had passed away. There were occasional disturbances, the draft was sometimes opposed, the arrest of deserters resisted, rendering necessary the aid of soldiers. A few were killed in these collisions, but the civil administration of the state was in full vigor. It was not impossible to administer criminal justice according to law in the Federal Courts. A single instance only is specified where military assistance was required to enforce the process of the Federal Court, and that was merely preventive. It is impossible to doubt that if the facts as established now had been before the Supreme Court of the United States in the case of Milligan, the result would have been the same. It is claimed that there was a great conspiracy pervading the State, having for its end a revolution, civil and military, in the interest of the enemies of the Government. But, in fact, a few only were arrested and tried before the military commission, and it cannot admit of question that the plaintiff could have been taken by civil officers before the courts, and there tried for any offenses of which he had been guilty.

I do not wish to withdraw from your consideration the facts on which you are to decide, but if the case of *ex parte Milligan*, reported in 4 Wallace, is to stand as the rule of his trial

before the military commission and the test of its validity, then I am impelled to say that no fair construction of the evidence presented to you has changed that rule, or protected with the forms of constitutional law that which the Supreme Court then pronounced null and void.

It is insisted that the act of Congress of March 3, 1863,[1] in relation to the writ of *habeas corpus*, recognized the authority of the military to arrest and to hold the plaintiff in custody until a grand jury met, and that did not occur till May, 1865.

If General Hovey and those whom he obeyed had followed the directions of that act, it is probable no controversy would have arisen upon the subject. The act of 1863 intended that a man in the condition of Milligan, a citizen of the state, not connected with the land or naval service, should be tried by the civil courts; that his alleged offenses should be investigated by a grand jury, and, if indicted, that he should be tried before the civil courts of the United States, with a jury to settle disputed facts, and a judge to expound the law. But it is too clear for debate, that the act of Congress of 1863 was not considered as ruling the case. Those who ordered and confirmed the trial of the plaintiff by military commission claimed and exercised the power as a law of the army above and beyond the authority of the civil courts. If it be conceded, therefore, that he could have been taken by a company of soldiers instead of by the process of a civil court, those who made the arrest should, in good faith, have submitted to the law of 1863, and brought the plaintiff before the proper court on the charges made against him. The military trial, sentence, and subsequent imprisonment of the plaintiff find, therefore, no justification in the act of 1863.

The third defense, which may have a great influence in the case, is the statute of limitations of 1863.[2] The seventh section of that statute declares that no suit or prosecution, civil or

[1] 12 U. S. Statutes at Large, 755.
[2] 12 U. S. Statutes at Large, 757.

criminal, shall be maintained for any arrest or imprisonment made or other trespasses or wrongs committed at any time during the rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or by or under any act of Congress, unless the same shall be commenced within two years next after the arrest, imprisonment, trespass or wrongs complained of.

At the time this statute was passed we were engaged in a great civil war. In such a war, perhaps, more than any other, under the influence of the passions created by the conflict, and the zeal of even the officers and soldiers who combatted for the maintenance of the Government, it was foreseen that private rights, both of person and property, might be invaded; that wrongs might be committed for which, under the Constitution and laws, the person committing them might be called to answer before the courts of the country. If we concede that there might be wrongs for which there could not be absolute indemnity, still it was but an act of justice to those thus subject to prosecutions to declare that remedies should be sought for through the courts within a certain time, provided it were not so short as, in effect, to destroy the remedy itself. The acts for which actions were to be brought within a limited time were those done under the authority of the chief magistrate of the nation—the commander-in-chief of its armies. I cannot doubt, therefore, that it was competent for Congress to enact that all such actions should be commenced within a reasonable time after the wrong was committed. The limitation prescribed by Congress was two years, thus giving ample opportunity for the enforcement of any rights created or protected by the Constitution or laws. It has always been decided that this is a matter resting with the Legislature, and the only question is whether the limitation is within the control of Congress, this action having been originally brought in one of the courts of the state. But states might take different views of the subject, and in some, where rebellious sentiments were paramount, the legislatures might leave such actions

against the agents of the Government without limitation. There must, therefore, be an authority co-extensive with the nation which could create a uniform rule, and to Congress only is such power given from the nature of the case. Even if it be true that the states may be able, subject to certain qualifications, to create rules for their own courts, which is not here intended to be questioned, yet, in the absence of any such binding rules, the legislation of Congress, in the cases named, must be a law to a state as well as to a Federal Court.

I think, therefore, that the statute of limitation of 1863 is obligatory in this case.

The action was commenced on the 13th of March, 1868. Two years would go back to the 13th of March, 1866. The plaintiff was released on the 10th April, 1866, and whatever may be said of his ability to commence a suit prior to that time, afterwards his power was complete. He waited till the 13th of March, 1868. It is said that the imprisonment was one continued act, and consequently that two years not having passed from its termination to the commencement of the suit, the action included the whole term, notwithstanding a part of the imprisonment occurred more than two years before; but it seems to me that the act of Congress was intended to say to any one who delayed his action it should be at his own risk. There is no saving in the statute, for imprisonment or any other cause. It was the design that whatever was done by way of suit should be done quickly, and not to leave officers and soldiers at a distant day to be harassed by litigation. In any event, therefore, the defendants would not be liable for any acts done prior to March 13, 1866. Are General Hovey and the officers of the military court responsible for any portion of the imprisonment in Ohio? The facts bearing on this part of the case are not disputed. The plaintiff, after the commutation of his sentence, and while the Federal Court and its Grand Jury were in session in this district, by order of General Hovey, was on the 2d of June, 1865, sent to the penitentiary of Ohio, at Columbus, and there received by the

warden. General Hovey made this order pursuant to instructions from the President, and, therefore, can claim the same exemption as for previous action, and no more. The members of the military court had no further agency in his transfer and imprisonment in Ohio than what grew out of the trial and sentence, and the only question is whether that was not the necessary and natural result of the sentence pronounced on the plaintiff. On the theory that the military court had jurisdiction of the case, the President could order the sentence to be carried into execution, or commute it. Whatever, therefore, was done to the plaintiff in Ohio was in consequence of his trial and conviction by the military commission; and if that fail as a justification to those who gave the instructions to General Hovey, it must also fail to those through whose action or instrumentality the transfer to Ohio was made.

The only remaining question, if the jury shall find a verdict for the plaintiff, is, what amount of compensation shall be allowed. That rests exclusively with the jury. At the same time a few remarks by the court on this point may not be out of place.

It is conceded by the plaintiff's counsel that the damages should be only compensatory, and not exemplary or punitive.

The principal defendants were officers in the army, acting under the President of the United States and his military subordinates. The members of the military commission were detailed as such by their official superior. All were of a profession where obedience was exacted as a rule of their conduct. It was at a crisis when much alarm was felt by the public. For the purpose of showing the reasons for their action, evidence has been introduced by the defendants tending to prove that there was a conspiracy of some persons, the aim of which was aid and comfort to the rebels, and hostility to the Government. There was in Indiana, in 1863, a secret society known as the "Sons of Liberty." There can be no doubt that some of the members of that society—how many does not appear—were engaged in a treasonable design against the

Government, and that their purpose was to involve the whole of the society, if possible; if not, then all whom they could influence in that design. The military authorities here at the time had knowledge of this scheme, and under the belief that it was indispensable to thwart it at once, arrested some of the supposed leaders, and among the rest the plaintiff. Under the convictions produced by this state of things the defendants arrested, tried and condemned the plaintiff upon the evidence before them. Whether the evidence or what might have been produced would have warranted his conviction before a civil court need not be decided. It is clear that the defendants were performing what they considered a military duty.

It should also be borne in mind that the conduct of the defendants in relation to the plaintiff was approved by those whose judgment and opinion they would regard with the greatest respect—the highest officers of the nation.

All the circumstances should be regarded in weighing the acts of the defendants. If you should believe there is any evidence connecting the plaintiff with a conspiracy against the Government, though it would not justify his trial by a military commission, yet it would undoubtedly affect your conclusions upon the question of damages; so, too, if you should believe the acts of the defendants were done without sufficient excuse, and the plaintiff was an innocent man.

As the court views the law and evidence the plaintiff can recover damages only for the imprisonment from the 13th March, 1866—for that he is entitled to compensation. That would include certainly any pecuniary loss thereby sustained, as well directly as indirectly.

If you believe there is no evidence connecting the defendants, Zumro and Bratton, with the imprisonment of the plaintiff, then as to them you will find a verdict of not guilty.

It will be observed that the charge of the court has been rather an exposition of the law than a commentary on the facts, and that has necessarily been so. The material facts are not in

controversy, and the question is, what is the law upon these facts?

The facts in dispute the court leaves to you. The law you will take from the court.

I commend the case to your careful, candid, and intelligent consideration.

The jury found a verdict for the plaintiff, with nominal damages.

THE MONITOR & HILL.

District Court—Northern District of Illinois—June, 1871.

In Admiralty.

1. Division of Damages.—Where a vessel was injured by the joint negligence of another vessel and a tug, the damage should be apportioned between them.

2. Measure of Damages.—In estimating the damages, the expense of repairing the mast, and demurrage for the time lost, should be allowed.

3. The mast, as repaired, having stood the remainder of the season, and it not appearing but what it would have continued serviceable, the expense of putting in a new mast during the next winter cannot be recovered.

This was a libel filed by John Prindeville, as owner of the barque Major Anderson, against the tug Monitor and the brig Hill, for damages caused by a collision in Chicago harbor.

The facts appear in the opinion.

Waite & Clarke, for libellant.

Spafford & McDaid, for respondent.

Blodgett, J.: The substantial facts in this case, as they appear from the pleadings and proofs, are, that on the morning of the 21st of April, 1869, the barque Major Anderson, belong-

ing to the libellant, was lying in the Chicago river, moored outside of two other vessels which were moored to the dock. Immediately below the Anderson the brig Hill lay moored outside of another vessel which was also moored to the dock. The tug Monitor came alongside the Hill and made fast to her, for the purpose of towing the Hill to some other point up the stream. A strong current was running in the river at the time. In order to get into the open channel, it was necessary to work the Hill outside of the Anderson, and in attempting to do so, and while she was in tow of the tug, the bowsprit of the Hill became entangled in the mizzen-lift of the Anderson, and produced such a strain upon the rigging of the Anderson as to fracture the mizzen-mast near the deck. This result was unquestionably produced, as shown by the testimony, by the combined unskillful management of those in charge of the tug, and those in charge of the Hill. It seems there was a line run from the timber-heads of the Hill to the dock, which should have been rendered off, or allowed to run free as soon as the Hill was in control of the tug; but instead of doing so the men on the Hill held said line taut, whereby the Hill was drawn forward and up-stream, instead of following the tug in a diagonal or direct line across or toward the center of the stream until she was outside the Anderson, as was manifestly intended. The evidence shows that those in charge of the tug were careless or negligent in not noticing the course the Hill was taking, and in keeping the force of the tug applied after the Hill's bowsprit became entangled in the rigging of the Anderson, although they were notified of the trouble, and ought to have slacked up.

I therefore find no difficulty in determining that the damage to the Anderson should be borne jointly by the Hill and the tug. The libellant claims as damages, first, the cost of fishing the mast, which was $58; second, demurrage for one day while the mast was being repaired, $100; third, the cost of a new mast which was put in during the following winter, $385.

The only serious difficulty I have met with in the case is in

fixing the amount of damages to which the libellant is justly entitled under the circumstances. The evidence shows that the mast was not broken off, but was cracked or strained to such an extent as to render it unsafe for service in the estimation of all who saw it, and it was properly fished at the expense of $58 and one day's delay, so that it seems for all practical purposes to have been as useful as it was before the injury. It may not have been as symmmetrical, but it evidently was as serviceable. It is claimed on the part of the libellants that they were entitled to a new mast in place of the old one thus broken by the carelessness of the respondents, and this might possibly be true if the old mast had been rendered entirely worthless, so that it was impossible to repair it and make it fit for service. But the proof shows that by fishing it did good service during the entire season, and there is no evidence but what it would have continued as serviceable for the remainder of the life of the vessel. There is also considerable evidence on the part of the respondents tending to show that this mast was weak and rotten at the time it received the injury. Some of the witnesses who examined it directly after the accident noticed rotton and decayed spots in it, and others who examined it the next winter, after it was taken out of the hull, testify to its showing a very considerable condition of decay.

The rule of compensation, where the damage can be repaired, is to make the injured part, as nearly as possible, as good as it was before the injury occurred; and applying that rule to this case, it seems to me the respondents ought not to be mulcted in the cost of the new mast. The old mast, when repaired, served all the purposes that it did before the injury. The vessel was eight or nine years old, and all her woodwork must therefore have been somewhat impaired and weakened by service and decay; especially does the proof show that condition of things to have existed in reference to this injured mast, as it certainly broke or cracked on very slight provocation, and I do not think it would be equitable to give the libellant the cost of the new mast. If he has seen fit to take out the damaged

or fished mast, and throw it away as a total loss, and replace it with a new one, he must do so at his own cost. There was no malice, or such gross carelessness shown in the case as entitles the libellant to exemplary or punitive damages. He is only entitled to be made good, and was substantially so by the fishing of the old mast.

This view of the case is fully sustained by the Supreme Court, in *Smith vs. Condry*, 1 Howard, 35; *Williamson vs. Barrett* 13 Howard, 111; *The Granite State*, 3 Wallace, 314.

A decree will therefore be entered finding both the tug and brig at fault, and jointly and severally liable for the damages, and fixing the damages at one hundred and fifty-eight dollars, being the cost of repairing the injured mast and one day's demurrage. No interest is allowed, as the proof shows respondents to have been at all times willing to pay the actual damage. But as no tender was made, the libellant will have his decree for costs.

HALL, Assignee, &c., vs. WAGER.

Circuit Court—Western District of Wisconsin—June Term, 1871.

1. Insolvency—A Condition of Fact, not of Belief.—To render a mortgage void under the thirty-fifth section of the Bankrupt Act it is not necessary that the debtor knew or believed himself insolvent. The section treats of insolvency as a condition of fact, not of belief, and with knowledge of which and its consequences he is chargeable in law.

2. It follows, as a logical sequence, that when a man insolvent in fact gives a mortgage to one existing creditor he does so with a view to give him a preference.

3. The bankrupt law of 1841, and the Massachusetts insolvent law and decisions commented upon.

4. The Act of 1841 declares void preferences made by a party *contemplating* bankruptcy; the act of 1867 includes those made by a party *being insolvent*, and the decisions under the former act are not always applicable to the present statute.

5. Construction of Acts of Insolvent.—The purpose of the act being to enforce the equal distribution of the estate, every act of an insolvent that tends to defeat that purpose should be construed strictly as against him, and courts should indulge every presumption permissible by the well settled rules of law to secure the full benefit of this cardinal principle of the law.

6. Insolvency Construed According to Place.—The strict definition of insolvency usually given in commercial centers should not be applied in country places. A party should be held insolvent only when he fails to meet his debts according to the usages and customs of the place of his business—the rule should be in harmony with the general custom of the place.

7. If an insolvent give a mortgage to a creditor who has reasonable cause to believe him insolvent, the fraud upon the Bankrupt Act is complete as to both.

8. Actual Belief, by Creditor, of Insolvency not Necessary.—The question as to the creditor is whether he "had reasonable cause to believe" the debtor insolvent—not what he *did* believe; the latter is immaterial. The creditor is not constituted the sole judge of the sufficiency of the evidence of his debtor's insolvency—that is for the court to determine, the security being attacked.

Hall, Assignee, &c., vs. Wager.

9. WHAT CONSTITUTES INSOLVENCY.—Where a debtor had, during two years paid off only a small portion of an overdue debt, had sold out the stock of goods for which the account was made, and transferred a part of the paper received therefor, had applied for extensions and been refused, had previously declined to execute a mortgage on the ground that it would injure his credit, and had been pressed by his different creditors—these facts constitute reasonable cause for belief of insolvency, and the creditor cannot escape from the consequences of knowledge of them.

This was a suit in equity brought by Augustus O. Hall, assignee of Leonard Lakin, bankrupt, to set aside a mortgage given by the bankrupt to the defendants Wager & Fales, on the ground that it was void under the bankrupt act.

The mortgage was for $3,000, dated December 15th, 1869, and was given to secure a debt of that amount owing by Lakin to the firm of Wager & Fales for balance due for stoves sold by them in 1867. The stoves were originally sold on four months time, and the debt had been for some time past due before the giving of this mortgage. Five notes for $600 each were then executed, made payable in six, twelve, sixteen, twenty, and twenty-four months respectively, with interest at 10 per cent. The account against the bankrupt was in 1867 about $4,000, and he paid in 1868 about $500, and in July, 1869, $200 more. In February, 1868, he asked for an extension, agreeing to make small payments, but no extension was formally given. In March, 1869, he asked for another extension, but none was given. In July, 1869, the defendants sent their agents to him for settlement, and asked for a mortgage to secure the balance due. He declined then to give it, and wrote defendants, July 9th, 1869, that if he gave a mortgage it would injure his credit. He agreed then to make small remittances, but did not do so, and they, in October, 1869, sent their claim to Richardson, their agent at Janesville, to get it secured by mortgage, and on the 15th of December, through him, they obtained the mortgage in question. In 1868 Lakin built a new store, at a cost of from $6,000 to $8,000, and in the same year sold out his stock of stoves, and gave up the stove business, continuing, however, to do business as a retail hardware merchant with a

reasonably fair credit at home, and with his creditors; but he had not met his payments, and owed on the 15th of December about $14,000 or $15,000 past due, a portion of which had been due for some time, but part of which he had secured by a note given by the purchasers of the stoves. He had been harassed for over a year by his creditors, had been borrowing money, obtaining renewals, and had used in his business funds held by him as treasurer and in trust.

In August, 1869, he gave a mortgage to secure his father-in-law $3,200 borrowed money.

Finches, Lynde & Miller, for complainant.

Cassoday & Merrill, for defendants, cited *In re Hunt*, 2 Bankrupt Register, 166; *Potter, Denison & Co. vs. Coggeshall*, 4 do., 19; *Babbitt, assignee, etc., vs. Walbrun et al.*, Id. 30; *Bean, assignee, etc., vs. Brookmire, et al.*, Id. 57; *Maurer, assignee, etc., vs. Frantz*, Id., 142; *Sedgwick, assignee, vs. Place*, 1 do., 204; *Langley vs. Perry*, 2 do., 180; *In re Gay*, Id., 115; *In re Locke*, Id., 123; *Armstrong, assignee, vs. Rickey*, Id., 150; *Wright vs. Filley*, 4 do., 197; *Jones vs. Howland*, 8 Metcalf, 377; *Morgan et al. vs. Mastick*, 2 Bankrupt Register, 163; *Doan vs. Compton, et al.*, Id., 183; *In re Gregg*, 4 do., 150; *Wadsworth vs. Tyler*, 2 do., 101; *Lee, assignee, etc. vs. Franklin Avenue German Savings Institution*, 3 do., 53.

HOPKINS, J.: Mr. Lakin was, beyond all question, I think, insolvent, and had been so for over two years when he gave the mortgage to defendants, although he swears he did not suppose he was, but, on the contrary, he thought he was worth $10,000 over and above all his debts. Soon after giving the mortgage, his other creditors instituted an investigation into his affairs, and it was made apparent that he was insolvent. He then attempted to compromise, but failed to accomplish it; and on the 8th of January, 1870, twenty-four days after giving this mortgage, he filed his petition in bankruptcy.

Mr. Mack, of Sandusky, Ohio, swears that Wager told him in November, 1867, that he thought Lakin insolvent, and that he intended to send out and get a mortgage to secure his claim. Wager denies that he said so, but says that Mack told him at that time that he (Mack) thought he would not stand it long; but that he told him he knew better, and that he was good, and Mr. Wager is partially sustained in his version by a Mr. Spencer, who was present. The defendants swear that they considered him worth $10,000 or $15,000 over his debts when they took the mortgage. The defendants' counsel claim that the facts, as proved, fail entirely to make out a case under the bankrupt act, and contend that to avoid the mortgage it must be shown that Lakin was insolvent when he gave the mortgage, and that he knew it; for if he did not know that he was insolvent he could not be said to have given the mortgage with a view to give the mortgagees a preference, which it would be necessary for the court to find as a question of fact under the thirty-fifth section of the bankrupt act, in order to avoid the mortgage.

The meaning of that part of the section is not entirely clear, and has been construed differently by the courts and judges who have been called upon to pass upon it. But I cannot concur with the defendants' counsel in their interpretation of it. The section does not require the debtor to know his insolvency, or to believe it. It treats of insolvency as a condition of fact, not of belief. He cannot set up his ignorance of that condition to defeat the operation of that section. He is presumed to know, and is chargeable with knowledge of it, and neither ignorance nor willful blindness will exonerate him from the operation of its provisions, so that, being insolvent in fact, and chargeable by law with knowledge of such condition, it would follow, it seems to me, as a logical sequence that he gave the mortgage with a view to give the defendants a preference. For not having property to pay all his creditors, the giving the defendants security to pay them in full necessarily operated as a preference, and he should be held as having intended the

rational and logical consequences of his acts. This section of the bankrupt act is almost a literal copy of section 89 of the Massachusetts Insolvent Law, and their court before its adoption by Congress had placed this construction upon it. Perhaps if the bankrupt had any reasonable cause to believe himself solvent, it might be held that he did not give the security with intent to give a preference. But treated as a rational man, and looking at the facts of his case as they really were, could Lakin reasonably have believed he was solvent? A case might arise in which a court might hold that a party had reasonable cause to believe himself solvent, when he was in fact insolvent, but it would have to possess some peculiar features, and the party would have to furnish a very satisfactory excuse for want of a knowledge of the fact showing his insolvency. This does not present such a case. From the facts of this case it does not seem possible that he could have believed himself solvent when he gave this mortgage. The case of *Jones vs. Howland*, 8 Metcalf, 377, relied upon so strenuously by defendants' counsel, arose under the bankrupt act of 1841, and the Supreme Court of Massachusetts has not followed that as applicable to their insolvent law, from which this section of the bankrupt act of 1867 under consideration was copied. Chief Justice SHAW, in delivering the opinion of that court in *Holbrook vs. Jackson, et al.*, 7 Cushing, page 136, says: "The provision of the bankrupt law of the United States under which the case of *Jones vs. Howland, et al.* was decided was very different from the present; it turned on the question of actual belief and intent, and not on reasonable ground to believe." And in the same opinion, page 149, he says: "We do not think it necessary, in order to avoid the conveyance, that the debtors knew they were insolvent, or in fact contemplated proceedings in insolvency; it is enough that they were in fact insolvent, and had no reasonable ground to believe themselves solvent." That court again in *Vennard vs. McConnell, et al.*, 11 Allen, 562, says: "The proposition cannot be maintained consistently with the established rules of law that the payment of a debt by a party

who is insolvent cannot be regarded as a preference, if made with the hope and expectation by the debtor that he will be able eventually to pay all his debts in full. The adjudicated cases leave no room for doubt on this point. *Thompson vs. Thompson*, 4 Cushing, 127; *Lee vs. Kilburn*, 3 *Gray*, 594; *Holbrook vs. Jackson*, 7 Cushing, 136, 149; *Barnard vs. Crosby*, 6 Allen, 327." And in *Beals vs. Clark*, 13 Gray, 21, the court says: "The jury were rightly instructed that it was competent for them to infer from the fact that Clark did give a preference to the plaintiff, that he intended to give it. *Denny vs. Dana*, 2 Cushing, 72." These cases abundantly show that the courts of Massachusetts have not regarded the case of *Jones vs. Howland*, *supra*, as giving a construction of their insolvent law, and I am satisfied that the United States courts which have adopted that interpretation as a proper construction of the provisions of our present bankrupt act have not examined the provisions of the two bankrupt acts critically, nor the insolvent law of Massachusetts and the construction given to their section in regard to preferences by the courts of that state, for if they had they would at once have seen that the provisions of the act of 1841, under which that was given, were entirely different from the present act, and that that decision had uniformly been held there as not applicable to the provisions of their insolvent law.

The weight of authority in the Federal Courts, I think, is largely in favor of the construction I have given to that section. *Campbell, assignee, etc., vs. Traders' National Bank, etc.*, 2 Bissell's Reports, 148; *Scammon, assignee, vs. Cole, et al.*, 3 Bankrupt Register, 100; *In re Kingsbury et al.*, Id., 84; *Graham, assignee, vs. Stark, et al.*, Id., 92; *Ahl & Buchman vs. Thorner*, Id., 29; *Vogle, assignee, vs. Lathrop*, 4 do., 146; *In re Black and Secor*, 1 do., 81; *Bradshaw, assignee, vs. Klein*, 2 Bissell, 20.

The preferences declared void by the second section of the act of 1841 were such as were made by a party *contemplating* becoming a bankrupt under the act. There the intent of the

debtor was the principal question. Under the present act a preference created by a party "being insolvent" is made void, and his intent or belief is not a question. The fact of insolvency being established or admitted, the preference ordinarily as to the debtor is presumed to be void—the presumption being strong or slight according to the circumstance of each case.

But I cannot see that the fact that the debtor knew or did not know of his insolvency at the time of creating the preference has much to do in determining the question as to him.

The purpose of the act being to enforce the equal distribution of an insolvent's estate, every act of an insolvent that tends to defeat that purpose should be construed strictly as against him, and courts should indulge every presumption that is permissible according to well settled rules of law to secure the full benefit of this cardinal principle of the law. I would not go so far as to prevent the exercise of a reasonable *bona fide* effort on the part of an energetic and hopeful debtor struggling with an honest intent to pay all his debts, for it is often the case that a trader may be embarrassed and unable to pay his debts as they mature, but by the exercise of judgment and unreserved frankness with his creditors goes through, pays all, and converts what was almost a calamity into a profitable enterprise. But to allow every embarrassed debtor to thus go on and sustain his acts because he says he *thought* he could go through, and hold as valid his payments and securities, would be to defeat altogether the object and provision of the bankrupt act.

I would not apply the strict definition of insolvency that is usually given in commercial centers to traders doing business in smaller country places. In large commercial centers a failure to meet payments as they become due is deemed insolvency, but not so in the country. The custom of traders generally is different there, and a party should be held insolvent there only when he fails to meet his debts according to the usage and custom of the place of his business. But this laxity should not be allowed to that extent as to hold that non-pay-

ment for a long time, or continued inability for years to pay and meet obligations should not be regarded as evidence of insolvency. I would not do away with all rule on that subject, but I would adopt a rule in harmony with the general custom of the place in which the party was engaged in business. And testing Lakin even by that rule, I hold that he must be deemed to have been insolvent when he gave this mortgage. He had been behind in his payments for over two years. His business for that time did not yield him the money to pay up. He was urged for payment and could not pay, applied for extensions which were refused, or if given he failed to meet according to the new terms, used trust funds in his business, borrowed money at banks and of his neighbors and clerks, and still was behind a great way in meeting his payments. To say, under such circumstances, that he should not be deemed insolvent, or that he had reasonable cause to believe himself solvent, would be indulging a laxity of business conduct and judgment entirely inconsistent with the views of business men in any community, and such as were never sanctioned by any court. To allow him any benefit of his plea of ignorance of his true condition under the circumstances of this case would do violence to his common intelligence and impeach his business ability to an extent far more damaging to him than to say that he hoped by some fortunate turn of business to get out of his embarrassed situation. I therefore find in this case that Lakin, when he gave this mortgage to the defendants was insolvent, and that he had no reasonable cause to believe himself solvent, that it was given to secure an existing debt, that it gave the defendants a preference over his other creditors, and that in law he should be held to have given it with a view to give them such preference. But in order to grant the relief sought by this bill it is necessary that I should find that the defendants, when they received such mortgage, had reasonable cause to believe that Lakin was insolvent, and that it was made in fraud of the provisions of the bankrupt act. This last proposition, it seems to me, is a necessary con-

clusion from an affirmative finding upon the facts. If an insolvent debtor gives a mortgage to one of his creditors, whereby he gives him a preference over his other creditors, and the creditor receiving the security has reasonable cause to believe the debtor insolvent when he receives it, the fraud upon the act as to both is complete, and the last proposition, as I have said, is but a logical conclusion rather than an independent fact or proposition necessary to be found in addition to the others, except as it naturally flows therefrom.

Chief Justice SHAW in *Holbrook vs. Jackson*, *supra*, page 151, says: "It must be reasonable cause on the part of the mortgagee to believe—not actual knowledge or actual belief—that he (the mortgagor) was insolvent." The section itself declares that having reasonable cause to believe—not believing—so that the question is, had they reasonable cause. Viewed in this light, the question as to what they did believe about his condition is immaterial, for if they had reasonable cause to believe he was insolvent, their security was void. They could not close their eyes to the evidence of his insolvency that they had before them. Nor are they constituted the sole judges of the sufficiency of such evidence. That is for the courts to determine when the security is attacked.

Now, in this case I think defendants had reasonable cause to believe Lakin insolvent when they received the mortgage. This is the most difficult question, under the testimony, to decide, but I think, in view of all the facts and circumstances, they had reasonable cause so to believe. This debt was over two years past due. He had been in business all the time, but had only paid in the two preceding years about $700 upon it; had sold out the stock of goods for which the account was made; had transferred a part of the paper received on that sale as collateral security to other of his creditors; had repeatedly applied for extensions which had been refused; had been repeatedly dunned without success; refused in July previous to give them a mortgage as a condition of an extension; wrote them that he thought such mortgage would injure his

credit; was told by Mr. Mack in November, at Sandusky, Ohio, that he thought he could not go through. These circumstances constitute, in my mind, a reasonable cause for them to have believed he was insolvent.

I have said before that such facts were evidence of insolvency, and that the law would pronounce a man thus situated an insolvent. These facts were known to them, and I cannot see any way of escape for them from the consequences of such knowledge. They refused all extension without ample security, and insisted upon it, notwithstanding his remonstrance that it would injure his credit. That was sufficient of itself to put them on inquiry. His fear about his credit should have put them upon inquiry as to the situation of it and the necessity for it. But they wholly neglected to investigate, were intent on security, purposely ignorant and blind, or intending to be, of his circumstances until after they got the security. The giving of the security resulted as he thought it would. It caused an investigation into his affairs by his other creditors, which developed his insolvency, as Lakin must have known all the while it would, and as I think the defendants also had reason to think it would. Again, their agent was at Broadhead in June, 1867, at a time when among the more prominent public and business men of the village his credit was freely canvassed in connection with the defalcation as to trust money, and it is scarcely credible that he could have been there at that time and not heard anything about it, when he had so large a claim and so long past due. I therefore think the defendants had reasonable cause to believe Lakin insolvent when they received this mortgage from him, and that the giving of it was a fraud upon the bankrupt act, and that it is void; and I direct a decree declaring it void, and requiring the defendants to cancel the same upon the records, and if they fail to do so for a period of thirty days from the entering of the decree in this case, that then the register of deeds for Green county, upon recording a copy of the decree in this case, enter upon the records thereof this mortgage cancelled by decree of the Circuit Court

of the United States for the Western District of Wisconsin, and that the complainant recover his costs of the defendants, to be taxed.

I do not think this court, in this suit, should exclude the defendants from proving their debt; at all events, I do not feel disposed to pass upon that question in this case. The objection may be taken in the bankrupt court if the creditors wish to exclude the claim of these defendants from participation in the distribution, and that court may allow or reject the claim, as it may see fit, without reference to the result of this suit.

This case was, on appeal, affirmed by the Supreme Court, opinion by CLIFFORD, J., not yet published, but will probably appear in 16 Wallace.

For cases of preference, decided since the above opinion, consult *In re Lord*, 5 Bankruptcy Register, 318; *In re Hunt vs. Hornell*, Id., 433; *Darby's Trustees vs. Lucas*, Id., 437; *Sedgwick vs. Millward*, Id., 347; *Cookinham vs. Morgan*, Id., 16; *Sawyer et al. vs. Turpin et al.*, Id., 339; *Toof vs. Martin*, 6 Bankruptcy Register, 49; *Curran et al. vs. Munger et al.*, Id., 33; *Bingham vs. Richmond & Gibbs*, Id., 127; *In re Forsyth and Murtha*, 7 Bankruptcy Register, 174; *Warren, assignee, etc., vs. Tenth National Bank et al.*, Id., 481; *Warren, assignee, etc., vs. Delaware, Lackawanna & Western R. R. Co.*, Id., 451; *Buchanan et al., vs. Smith, assignee, etc.*, Id., 513; *Tiffany vs. Lucas*, 8 Bankruptcy Register, 49; *Gilbert vs. Priest*, Id., 159; *Seaver vs. Spink*, Id., 218; *Hyde vs. Sontag & Eldridge*, Id., 225; *Bean vs. Amsink*, Id., 228. [*Reporter.*

DENIKE vs. ROURKE.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JUNE, 1871.

1. SECOND TAX SALE—POSTPONES DEED.—Under the statute of Illinois, if the purchaser at tax sale allows the land to be again sold, within two years, whether for the same class of taxes or for other taxes properly assessed, his right to a deed is postponed, and a deed obtained within the limitation from the second sale is void and inoperative.

2. MUNICIPAL TAXES, are levied under the same general authority as State and County taxes, and a sale by municipal authority is essentially a sale by State authority.

3. In claiming title under a tax deed, the purchaser, having served a notice upon the person in whose name the land was taxed, as required by sec. 4, art. 9, of the Constitution of Illinois, must show affirmatively by proof that such person, at the time of such service, resided in the county where the land is situated.

4. Constitutional provisions for the protection of tax-payers must be strictly construed.

Ejectment for lot 6, of Mayer's subdivision of lots 1 and 4, in block 22, in the Canal Trustees' subdivision of the south fractional half of Section 29, Township 39, Range 14, situated in Cook county, Illinois.

The facts appear in the opinion.

Homer Cook, for plaintiff.

Wm. B. Snowhook, for defendant.

BLODGETT, J.: Upon the trial the plaintiff exhibited a chain of title from the United States Government to himself, such as, if no defense were interposed, clearly showed the fee simple in the property to be in the plaintiff as averred in his declaration. But the defendant, to defeat the plaintiff's right of recovery, claimed title under a tax deed executed by the sheriff of Cook county to P. W. Snowhook, and a deed from P. W.

Snowhook to the defendant. Said tax deed was predicated upon a sale made by the collector of Cook county to said P. W. Snowhook on the 27th day of August, 1866, for the taxes of 1865. Defendant also showed the assessment of said taxes a warrant for the collection thereof, return by the collector as delinquent, due notice of application for judgment against said lot for delinquent taxes, and judgment, the issue of precept, and sale in pursuance of said judgment, and also an affidavit filed by said P. W. Snowhook before the issue of said deed, setting forth in substance that notice had been served on Hugh Maher, in whose name said lot was taxed for the year 1865, of the said purchase, and the time when the redemption would expire; also, that no person was in possession of said premises, and a publication of a notice, substantially the same as the one served on Maher, in the Chicago *Post*, for three successive publications, three months prior to the expiration of the time for redemption.

The plaintiff, for the purpose of defeating the tax title thus set up, adduced proof showing that said lot 6 was duly assessed for taxes by the municipal authorities of the city of Chicago, for the year 1866; that said taxes not being paid, said lot was sold for said taxes in March, 1867, whereby plaintiff insisted that the right of said Snowhook as purchaser at the tax sale in August, 1866, to a deed of said lot was postponed for two years; or, in other words, that the deed given by the sheriff to Snowhook, and introduced in testimony, was void, for the reason that Snowhook was not entitled to his deed at the time the same was issued.

The statutory provision relied upon by the plaintiff reads as follows: "If any purchaser of lands sold for taxes shall suffer the same to be again sold for taxes before the expiration of two years from the date of his or her purchase, such purchaser shall not be entitled to a deed for the land until the expiration of two years from the date of the second sale; during which time the land shall be subject to redemption upon the terms and conditions prescribed in this act, but the person redeeming

shall only be required to pay, for the use of such first purchaser, the amount paid by him, and double the amount paid by the second purchaser."[1]

It was contended, on the part of the defendant, that this provision only applies to tax sales made for state, county and town purposes, and that the purchaser at a tax sale was not postponed in his right to his deed by the sale of the land for taxes under municipal authority. But I am of opinion that it becomes, under this clause of the law, the duty of any purchaser of lands or lots at tax sales to see to it that they are not again sold within two years; and that in case the lands are so sold, whether for the same class of taxes or for other taxes, properly assessed, the right to the deed is postponed.

The evident purpose and object of the law was to make sure that all taxes would be paid during the time the purchaser's inchoate right to a deed was maturing, and it is as much his duty to see that the taxes levied by the municipal authority are paid, as to look for those levied directly for state and county purposes. Municipal taxes are levied by virtue of the same general authority which levies and enforces a payment of state and county taxes — the municipal authorities acting by virtue of the power delegated to them by the state government, and a sale by municipal authority is, therefore, essentially in all respects a sale by state authority. Upon this point then I am clear, that the defendant's deed was void and inoperative, and I should be obliged to find for the plaintiff; but on looking further into the papers I observe that the only notice which was served in this case as an attempt at compliance with the constitutional requirements found in Sec. 4 of Art. 9 of the Constitution of Illinois, was by service of notice on Hugh Maher, in whose name said lot was taxed for the year 1865. The constitutional requirement is, "that such purchaser shall serve, or cause to be served, a written notice of such purchase

[1] Act of 12th February, 1853, Session Laws, p. 956; Gross Statutes, 1870, p. 609.

on every person in possession of such land or town lot, three months before the expiration of the time of redemption from such sale; in which notice he shall state when he purchased the land or town lot, the description of the land or lot he has purchased, and when the time of redemption will expire. In like manner he shall serve on the person or persons in whose name or names such land or lot is taxed, a similar written notice, *if such person or persons shall reside in the county where such land or lot shall be situated.*"

The evidence in this case shows that the notice substantially required by the foregoing provisions, was served on Hugh Maher; and it also shows that no person was in possession of the lot in question at the time of the service of such notice.

It seems very clear to me that it should appear affirmatively by the proof, not only that the notice was served upon the person in whose name the property was taxed, in the event of the property's being unoccupied, but also that such person was a resident of said county at the time of such service.

This being a constitutional provision for the protection of tax-payers, it is to be construed strictly. No person is to take any rights under a tax title, without following literally the directions given by the Constitution. This objection was not raised at the trial, and I do not now intend to base my decision solely on that; but it seems to me that this alone is an insuperable objection to the defendant's title as exhibited on the trial.

Judgment for the plaintiff.

SEYMOUR vs. CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JUNE, 1871.

1. RAILWAY CARRIERS—NEGLIGENCE.—Railway companies who are carriers of passengers are required to use all the means reasonably in their power to prevent accident. To render them liable it is not necessary that they should be guilty of great negligence. It is enough if an accident be caused solely by any negligence on their part, however slight, if by the exercise of the strictest care or precaution, reasonably within their power, the injury would not have been sustained.

2. NEGLIGENCE OF TRAVELER.—But a company, although guilty of negligence, will not be liable if the injury arose from the want of ordinary or proper care on the part of the plaintiff at the time.

3. So, where the accident was caused by the plaintiff's stepping on ice left on the platform in the depot, the company is not liable if the plaintiff, having seen pieces of ice, could, by reasonable care, have avoided stepping on one of them.

4. SAFETY OF PLATFORM.—It is the duty of a railroad company using a platform in a depot belonging to another company to see that the platform used is safe and convenient for passengers to get in and out of the cars, regardless of any arrangement with such other company. Whether or not ice was placed on the platform by the company's agents makes no difference if the jury believe that it was dangerous to passengers going to or getting out of the cars—the cars being then open to receive passengers.

5. The agents of the company, by opening the doors of the cars, notified passengers to enter them, and, in fact, notified them that the platform was safe and free from obstructions for those who had purchased tickets.

6. CONTRIBUTORY NEGLIGENCE.—The plaintiff was obliged to use ordinary care and prudence in descending the steps and landing on the platform, and if at any moment it would have appeared to a reasonably prudent person that there was risk of danger to herself in proceeding, then, if she did proceed, it was at her own peril, even though the defendant was guilty of negligence.

7. But if, on the other hand, taking all the circumstances of the situation together, there would not have appeared to a reasonably prudent person any danger in descending the steps and going on the platform,

then she cannot be said to have been guilty of contributory negligence, though in fact injury followed what she did.

8. WHAT JURY MAY CONSIDER.—The jury may take into consideration the degree of light, the time of day, the fact that the plaintiff saw the pieces of ice, and the position she occupied when she first saw them.

9. DAMAGES.—The jury can only give as damages compensation for the injury, and cannot add anything by way of punishing the defendant.

10. A MARRIED WOMAN,—has the right to sue for personal injuries without joining her husband.

This was an action by Mary A. Seymour for damages for personal injuries caused by the alleged negligence of the defendant.

About ten o'clock in the forenoon of the 30th of August, 1870, the plaintiff purchased of the defendant a passenger ticket from Chicago to Galesburg, and proceeded to the defendant's train of cars. She had her baggage checked for Galesburg, and passed up the steps of one of the Pullman palace cars, intending to pay the extra fare for the right to travel in it. But she found the door of that car locked, and thereupon she passed across the platform of that car and into the car next to the palace car, laid down her shawl and basket and retraced her way to the door. Passing out upon the platform of that car she proceeded to pass to the depot platform for the purpose of finding the person who had the care of the palace car, that she might take a seat in it. As she was about to step from the platform of the car to the platform of the depot, she noticed some pieces of ice on her right, near to the palace car, and it seems there were other pieces of ice close to the steps of the car from which she was about to descend, and upon one of them she set her foot, slipped and fell, dislocating her left ankle.

The plaintiff, a married woman, had never been divorced from her husband, but during the last nine years had supported herself, and had not seen her husband in seven years.

The Illinois Central Railroad Company were the owners of the depot where the accident occurred. The defendant insisted that the plaintiff was not competent to sue in her own name without joining her husband in the action, and that, upon

plaintiff's own showing, she was not entitled to recover, because she saw some of the pieces of ice before she stepped off the car, and that, therefore, she could have avoided that upon which she put her foot.

O. B. Sansum, and *Samuel W. Fuller*, for plaintiff.

Walker, Dexter & Smith, for defendant.

DAVIS, J., charged the jury as follows:

Railway companies who are carriers of passengers are required to use all the means reasonably in their power to prevent accident. It is not necessary to charge them with liability that they be guilty of great negligence. It is enough if the accident was caused solely by any negligence on their part, however slight, if by the exercise of the strictest care or precaution, reasonably within their power, the injury would not have been sustained. But the company will not be liable, although guilty of negligence, if the injury arose from the want of ordinary or proper care on the part of the plaintiff at the time of its commission, so that in this case the company would not be liable, although the accident would not have happened if the ice had not been left on the platform, or if the plaintiff, having seen that there were pieces of ice on the platform, could, by reasonable care, have avoided stepping on one of them. And it is for you to say whether this accident occurred to Mrs. Seymour in consequence of want of reasonable care on her part, or whether, as she says, it was entirely the company's own negligence that produced it.

It was the duty of the defendant to see that the platform used by it was safe and convenient for passengers to get in and out of the cars, regardless of any arrangement with the Illinois Central Railroad Company, who owned the building. And whether the ice was placed on the platform by the agents of the company or not makes no difference in this case, if the jury believe it was dangerous to passengers going to or getting out of the cars, and the cars were open to receive passengers.

As soon as the cars were opened to receive passengers it was the duty of the employes of the company to have seen the ice and to have removod it. The agents of the company, by opening the doors of the cars, invited passengers to enter them, and, in fact, notified them that the platform was safe and free from obstructions for those who had purchased tickets to enter the cars.

But the main question in this case relates to the *fault*. Whether the plaintiff was in fault, the court does not instruct you as a matter of law upon the evidence that the plaintiff was or was not guilty of contributory negligence, but leaves the fact to be found by you under the rules of law stated by the court.

Mrs. Seymour was obliged to use ordinary care and prudence in descending the steps and landing on the platform, and if at any moment it would have appeared to a reasonably prudent person that there was risk of danger to herself in proceeding, then if she did proceed it was at her own peril, even though the defendant was guilty of negligence.

But if, on the other hand, taking all the circumstances of the situation together, there would not have appeared to a reasonably prudent person any danger in descending the steps and going on the platform, then she cannot be said to have been guilty of contributory negligence, though in fact injury followed what she did.

In deciding these points the jury will take into consideration the degree of light on the steps and platform, the time of day, the fact that she saw pieces of ice and a wet spot on the platform, and the position she occupied when she first saw them.

If the jury should find from the evidence that the plaintiff's conduct contributed to the accident, they will find for the defendant.

If, on the contrary, they shall find that she was not negligent and the defendant was, then they will proceed to the question of damages. And on this point they are instructed they must

give no more than will compensate the plaintiff for the injury, and cannot add anything by way of punishing the defendant.

In estimating the extent of this compensation they can take into consideration the loss of time sustained, the expenses attending the cure of the injury, the length of time likely to occur before a permanent cure is effected, and the pain and suffering undergone by the plaintiff.

The jury are instructed that under the evidence in this case the plaintiff has the right to sue without joining her husband.

The jury found a verdict for $2,500 damages for plaintiff.

If a railroad company allows the trains of another company to run over its track, as to passengers on its own trains it is responsible in the same manner as if all the trains belonged to itself. *Barron vs. Illinois Central R. R. Co.*, Volume 1 of this Series, p. 453, and cases there cited.

It is no defense to an action for injuries caused by the negligence of a defendant railroad company, that the negligence of a third party contributed to the injuries. *Webster vs. Hudson River R. R. Co.*, 38 New York, 260.

To maintain an action for negligence, there must be fault on the part of the defendant, and no want of ordinary care on the part of the plaintiff. In proportion to the negligence of one party, should be measured the degree of care required of the other. Where there are faults on both sides, the plaintiff may, in some cases, recover, as where it appears that his negligence is comparatively slight, and that of the defendant gross. *Galena, etc., R. R. Co. vs. Jacobs*, 20 Illinois, 478; *C., B. & Q. R. R. Co. vs. Dewey*, 26 do. 255; *Same vs. Hazard, id.* 373; *Chicago, etc., R. R. Co. vs. Pondrom*, 50 do. 333; *Chicago, etc., R. R. Co. vs. Harris*, 54 do. 528.

As to carrier's liability for negligence where both parties are in fault, see 2 Redfield on Railways, 240.

The doctrine in relation to the mutual negligence of parties in causing an injury, as affecting the right of parties to recover therefor, is applicable to passengers carried upon railroads. *Galena, etc., R. R. Co. vs. Fay*, 16 Illinois, 558; *Same vs. Yarwood*, 15 do. 468; *Same vs. Same*, 17 do. 509; *Chicago, etc., R. R. Co. vs. Still*, 19 Illinois, 500.

For a discussion of the doctrine of contributory negligence, consult the following cases in New York Court of Appeals: *Wilds vs. Hudson River R. R. Co.* 24 New York, 430: *same case*, 29 do. 315; *Brown vs. New York Central R. R. Co.* 34 do. 404; *Chapman vs. New Haven R. R. Co.* 19 do. 341; *Gonzales vs. New York and Harlem R. R. Co.* 38 do. 440; *Grippen vs. New York Central R. R. Co.* 40 do. 34; *Nicholson vs. Erie Ry. Co.* 41 do. 525; *Oxen vs. Hudson River R. R. Co.* 35 do. 516; *Ernst vs. Hudson River R. R. Co.* 35 do. 9; *same case*, 39 do. 61. [*Reporter.*

THE VIRGINIA.

CIRCUIT COURT—SOUTHERN DISTRICT OF ILLINOIS—JUNE TERM, 1871.

IN ADMIRALTY.

1. Where a steamer, stranded in the Mississippi river, employs another less powerful one to assist in getting her off, it is the duty of the former to see that there are no obstacles or dangers in the place where the proposed movement is to be made.
2. Where, by the joint efforts of both steamers, the stranded steamer is got off, the general direction and control of the movement being with her, she is liable for the loss of the other steamer, wrecked in the manœuver, and also for the services rendered.
3. The smaller steamer not having supplied the sole motive power, does not, under such circumstances, run the risks of salvage service.

Appeal from decree of District Court on a libel filed by owners of the steam ferryboat Missionary against the steamboat Virginia for services and damages for loss of vessel. The facts appear in the opinion.

Green & Gilbert, for libellant.

Allen, Mulkey & Wheeler, for respondent.

DRUMMOND, J.: The Virginia, while on a voyage from St. Louis to New Orleans, in the fall of 1868, ran on a "log heap" in the Mississippi river, a few miles below New Madrid. She struck with her bow and thus lay fast with her stern up stream. After several ineffectual efforts to get off by lighting and by the use of the engines, a message was, on the evening of the 24th of October, sent to Cairo for assistance, and on the morning of the 25th the Missionary, in answer to the message, arrived and rounded to on the starboard side of the Virginia in a reverse position,—the bow of the Missionary being up

stream. They were thus fastened together side by side, the stern of the Missionary and the bow of the Virginia being nearly opposite to each other. They were, however, of very unequal length. The Virginia was of considerable size and power,—two hundred and twenty-eight feet long, eight hundred and ninety tons burthen, and had on board at the time she struck four hundred and fifty tons of freight. The Missionary was one hundred and thirty-eight feet long and about one hundred tons burthen.

After the arrival of the Missionary, about sixty tons of freight, more or less, were removed from the Virginia to the Missionary. It was then resolved that another effort should be made to get the Virginia off. The undisputed facts are, that the two steamers were fastened together in the manner stated, steam raised on both, and the engines of each put in operation at about the same time; the Virginia was thus backing and the Missionary trying to go ahead. Very soon both started, and the result was that the Virginia got off the "log heap" and the Missionary ran on a snag, stove a hole in her bottom, and shortly after sunk and became a loss, except as to some part of her machinery.

The libellants claim that the captain of the Virginia took entire control of the Missionary and that the former is liable for the loss as an act of negligence, as well as for the value of the services rendered. On the other hand it is insisted the Missionary was under the management of her own officers and men, and took the ordinary risks incident to a salvage service. The two steamers were fastened together by the joint act of the officers and men of both. The co-operation of the Missionary in removing the Virginia from the "log heap" was with the consent and acquiescence of the officers of the Missionary. Webb, the *quasi* captain of the Missionary, and Kauffman, the engineer, agreed to assist by the action of the engines in getting the Virginia off. But this seems to have been the extent of the aid given by the Missionary. The general direction and control of the movement was with the

Virginia. If it be conceded the service of the Missionary was a salvage service, which is apparently the footing upon which the libellants seek to place it, then it involved the ordinary risks of that kind of service, and no more. It may be admitted that if a steamer, in trying to save a stranded vessel by its own motive power, is lost or injured by the movement, it is one of the necessities of the service, and is a risk assumed as such. It is because as well of the peril to the vessel or property saved, as the risk to the salvor, that courts of admiralty allow more than a *quantum meruit* compensation. If the Missionary had in this case been the sole motor, a more rigid measure of responsibility would have attached. And the case must turn mainly on this: Whose peculiar duty was it, under the circumstances, to foresee and guard against the possible consequences of success in the effort which was about to be made? The Virginia had employed the Missionary to aid in the relief without any special contract as to the terms on which it was to be affected. The former was many times larger and more powerful than the latter, and in case of motion, even though lashed together, would substantially control the Missionary. It was, therefore, the duty of the Virginia, in a special manner, to explore the spot that might be passed over in the movement proposed to be made, and to see that there was no obstacle in the way which would be likely to cause disaster. The fact that the officers of the Missionary acquiesced in the demand made for the assistance of the engines, did not make them responsible farther than for the consequences necessarily growing out of such consent. If the case had been reversed and the Virginia had been lost, it could scarcely be maintained, in the absence of willful fault on the part of the Missionary, that the latter would have been liable for the loss, or even for an apportionment of the loss.[1] The Virginia had been on the "log heap" more than a day, and had had every opportunity for examination; in fact, had sounded, in

[1] 2 Parsons on Shipping and Admiralty, 263.

order to ascertain the depth of water. The Missionary was employed by the Virginia to perform a special service—to aid in moving the latter from the "log heap." If the assistance rendered had been that of lighting only, there can be no doubt it would have been the duty of the Virginia to take reasonable care of the Missionary, and the Missionary, in such case, could scarcely be held accountable for the dangers of navigation; and the fact that the officers of the Missionary merely assented to the action of the engineers cannot change the rule. Webb, on the Missionary, gave notice to the captain of the Virginia of the approaching danger. It is asserted the warning was not heard, but it at least shows that some of the parties foresaw the peril of the movement—something which the Virginia ought also to have foreseen and guarded against. The evidence shows that if proper vigilance and prudence had been used by the Virginia, the disaster might have been prevented. The open snags could have been seen, the hidden ones discovered.

No great stress is placed upon the admissions of the captain of the Virginia, to the effect that the loss might be paid as soon as ascertained, because that was nothing more, at most, than an admission that the Virginia was liable for the loss, a question of law under the facts of the case.

The District Court allowed five hundred dollars as the value of the services rendered, and four thousand dollars for the loss or damage. I shall not give any interest on the decree of the District Court, but will affirm the decree as the decree of this court for that amount as found of the present date.

SAYLES vs. CHICAGO & NORTHWESTERN RAILROAD COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JUNE, 1871.

IN EQUITY.

1. BALANCE OF TESTIMONY.—As a general rule the positive testimony of witnesses as to the existence of prior mechanism must outweigh merely negative proof.

2. PRESUMPTION FROM NON-USER.—The great utility of an invention being conceded, the fact that if used at all it was on a single car for some years, seems, unexplained, conclusive evidence against its existence.

3. A man should not be deprived of the results of a successful effort merely because some one else has come near it.

4. If it be asked how often a mechanism shall be used to antedate a patented invention, the answer is, until that which is claimed as new in the patent is complete, although the thing may have been imperfect as an instrument or a machine.

5. If it were manifest that the thing claimed in the patent were accomplished, one prior use would be sufficient to defeat the patent.

6. If the construction of the thing itself demonstrates that it was within the principle of the patented invention, then, perhaps, no use of a prior device would be sufficient to destroy the novelty of that which was patented. It might then be said to prove itself.

7. In most cases, sufficient prior use must be shown to prove that the mechanism will accomplish what is claimed, and while this is true of a patented device, it is equally true of that by which a patent is sought to be defeated.

8. PATENTEES MAY SUPPRESS COMBINATIONS; EQUIVALENTS.—Inventors of a combination are as much entitled to suppress every other combination of the same ingredients to produce the same results, not substantially different from what they have invented and caused to be patented, as any other class of inventors; and they have a right to invoke the doctrine of equivalents to that extent to sustain their invention.

9. COLORABLE ALTERATION—HOW DECIDED.—It must always be very much a matter of judgment to the eye, in the examination of two machines, and in observing their mode of operation, whether the one, in the whole, or any of its parts, is a mere colorable or formal alteration of the other.

Sayles vs. Chicago and Northwestern R. R. Co.

10. USING INVENTION TO ACCOMPLISH FURTHER IMPROVEMENT IS INFRINGEMENT.—If a patentee has invented a combination of two or more old things so as to produce a new and useful result, then he has the right to treat as infringers all who have used his invention in order to accomplish something more or better, when, without the aid of such invention, it could not be effected.

11. TANNER BRAKE CONSTRUED.—The principle of the Tanner brake, as invented by Bachelder & Thompson, and as patented, is the combination of the two series of brakes, (counting the brakes at each end of the car as a series,) with each other and with the windlass at each end, so that all the brakes can be applied at once at either end, by the brakeman.

12. Bachelder & Thompson were the first to successfully make this combination.

This was a rehearing of the case of *Sayles vs. Chicago & Northwestern Railroad Company*, reported in Vol. I, of this Series, p. 468.

The facts are fully stated in the opinion, and in the case as previously reported.

West & Bond, and *S. D. Cozzens*, for complainants.

H. W. Blodgett, and *B. R. Curtis*, for defendants.

DRUMMOND, J.: This case was before the court some years since, and an opinion given upon the points then submitted and argued.

The court then decided that Bachelder & Thompson were the inventors, in 1846, of the combination described in their specifications of the brakes of the two trucks with the operative windlasses by the means designated, so that the brakeman, by operating either windlass at the end of a railroad car could apply the brakes of both trucks simultaneously to the wheels to which the brakes were respectively attached; and that the patent which was issued to Henry Tanner, the assignee of Bachelder & Thompson, in 1852, was valid.

This decision was of course made on the case as then presented, and on the proofs then before the court. The question of infringement was not at that time seriously controverted, and an interlocutory order was made, referring the case to a

master. Afterwards an application was made to open this decree because of new evidence discovered affecting the question of novelty of the claim of Bachelder & Thompson, and the court permitted additional proofs to be taken.

The case has been again argued upon the new evidence, and upon the last argument it has been insisted that the defendant does not infringe the Tanner patent, even if valid.

The new evidence relates mainly to two brakes, which, it is alleged, anticipated the discovery of Bachelder & Thompson. 1st. The brake upon the car John Tyler used on the Camden & Amboy Railroad. 2d. The Stanley-Talson brake used on the same road.

In 1843, Mr. Tyler, then President of the United States, made a visit to the Eastern States, and a car was fitted up with unusual effort and expense to carry the President over the Camden & Amboy Railroad, on his way east.

This car was so unique among the cars of the time that it thenceforth bore the name of the President. As a part of its appointments the defense claims that it had a double brake, combining the two trucks, and operating in the same way and producing the same effect as the Tanner brake. If that were so, then undoubtedly it anticipated the invention of Bachelder & Thompson, because it is certain that this special car was constructed, and conveyed the President over the Camden & Amboy Railroad, in 1843. The serious question, therefore, on this part of the case is, when was the double brake put on the John Tyler car?

The evidence is curious on this point. Several witnesses, many of them undoubtedly with full conviction, declare that the car had the double brake on when it started out in 1843, and when the President rode on it. Many others declare that the double brake was not put on the car till 1851, and that it was the Hodge brake, an invention subsequent in time to that of Bachelder & Thompson, now covered by the Tanner patent, and hence generally called the Tanner brake.

It is necessary to determine in the midst of this great con-

flict of evidence, where the truth is, in the judgment of the court; and looking at all the facts bearing on the point, I think that the witnesses who state that the double brake, combining the two trucks in the manner of the Tanner patent, was on the John Tyler car in 1843, are mistaken, or testify untruly.

It is said that the evidence for the defense in this particular is positive, and on the other side negative; that is so, and if it depended upon that circumstance alone, then it might be the positive testimony would outweigh the negative. But there are various well established facts inconsistent with this positive evidence. It is clear in the examinations which were made among the employés of the Camden & Amboy Railroad, growing out of the suits at Albany, brought by Mr. Tanner against the New York & Erie Railroad Company, and the Hudson River Railroad Company, which were numerous and thorough, that the double brake on the John Tyler car did not assume a tangible shape then, though application was made to some of the witnesses who now assert its existence in 1843. These examinations were made in 1853 and 1854, and seem to have been conducted in entire good faith to ascertain facts to enable the railroads to defend against the Tanner patent. The defense was unsuccessful.

The testimony tending to establish the attachment of a double brake to the John Tyler car in 1851, is of itself in the nature of positive evidence, and therefore is entitled in effect to the consideration of that kind of evidence.

There is one fact established which, unexplained, seems to be conclusive upon this part of the case. The counsel for the defense do not controvert the value or the utility of the Tanner brake. Now, if there was such a brake in substance or effect on the car referred to, then it was not attached to the other cars of the Camden & Amboy Railroad, because the proof appears ample that some years after 1843 the cars of the railroad company were run generally with the single brake alone; and if it were true that a double acting brake of the kind included in the model of the John Tyler car produced at the

hearing, existed in 1843, it is scarcely possible to doubt that it would have gone into general use at once on the road.

In addition to this, many of the witnesses for the defense, who originally spoke with as much confidence as any others, afterwards retracted, and admitted that they were in error when they asserted the double acting brake was on the Camden & Amboy Railroad in 1843.

The testimony shows that in 1842 a man by the name of Stanley made and applied a brake in some respects, at least, similar to that of the Tanner brake.

The materials of which it was composed were too slight, and it proved a failure. Afterwards one Talson strengthened them, and perhaps made some slight changes, and the brake was used on several occasions. It seems afterwards to have been thrown aside. For this different reasons have been given. The position taken that the John Tyler car brake, as claimed, and the Stanley-Talson brake, also as claimed, were continued in use for several years after 1842 and 1843, I consider not sustained by the evidence. There was no successful practical double brake on the Camden & Amboy Railroad in operation prior to the invention of Bachelder & Thompson.

It is the history of inventions that when different persons are exploring or experimenting in the same field, many efforts which ultimately turn out to be failures often come very near success; and when other efforts have proved successful, these last should not be deprived of the results of success simply because others have come near to them. The fact that the Camden & Amboy Railroad was without a successful double acting brake till the Hodge brake was introduced, is strong evidence against the claim set up now both for the brake of the John Tyler car and that of Stanley & Talson. It is asked how often shall a brake be used to antedate the invention of Bachelder & Thompson? The answer is, until that which is claimed as new in the patent is complete, although the thing may have been imperfect as an instrument or a machine. If it were manifest that the thing claimed in the patent was

accomplished, one use would be sufficient. If the construction of the thing of itself demonstrated that it was within the principle here stated, then perhaps no use need be established. It might then be said to prove itself. But in most cases sufficient use must be shown to prove it will accomplish what is claimed; and while this is generally true of a patent, it is equally true of that by which a patent is sought to be defeated; otherwise it rests in the region of mere experiment.

The argument that there has been no infringement is this: Brakes had been applied to the trucks of railroad cars; they had been connected together, therefore Bachelder & Thompson could only claim some peculiar method of making the connection. All other methods were left open, and if the connection of the brakes was in a different way from that of Bachelder & Thompson, then there could be no infringement. The defendant's brake—that of Stevens—has a different mode of connecting the two systems of brakes, consequently there is no infringement.

We must bear in mind that the principle of the Tanner brake is the combination of the two series of brakes, counting the brakes at each end of the cars as a series, with each other and with the windlass at each end, so that all the brakes can be applied at once at either end by the brakeman. This combination is produced by means of what is termed a vibrating lever, essentially as specified, and the question is, whether the Stevens brake, that being used by the defendants, accomplishes the same result by analogous means or equivalent combinations within the terms prescribed by the Supreme Court in the case of *McCormick vs. Talcott*, 20 Howard, R. 402. The view the court took of the Stevens brake on a former occasion was that it was distinct from the Tanner brake in this: that by some new and original devices Stevens obtained an equality of force upon the brakes, thus retarding the wheels uniformly,[1] and

[1] *Emigh vs. Chicago, Burlington and Quincy Railroad Co.*, Vol. I. of this Series, p. 400.

therefore the Stevens patent was sustained. That case went to the Supreme Court of the United States. There was a difference of opinion in the court on some of the points decided in this court, and the case was never reported, the decree being affirmed by a divided court; but it is understood that the court was unanimous in sustaining the validity of the Stevens patent. The only question, therefore, is whether the Stevens brake, as constructed and operated, embodies, in effect, the invention of Bachelder & Thompson by combining the brake series of the different trucks with the windlasses, so that they can be operated at once from either end of the car. The rule laid down upon the subject of infringement by the Supreme Court of the United States in the case of *Seymour vs. Osborne*, 11 Wallace, 516, is that inventors of a combination are as much entitled to suppress every other combination of the same ingredients to produce the same result not substantially different from what they have invented and caused to be patented, as any other class of inventors, and they have a right to invoke the doctrine of equivalents to that extent to sustain their invention.

It must always be very much a matter of judgment to the eye in the examination of two machines and in observing their mode of operation, whether the one, in the whole or any of its parts is a mere colorable or formal alteration of the other. If a patentee has invented a combination of two or more old things so as to produce a new and useful result, then he has a right to treat as infringers all who have used his invention in order to accomplish something more or better, when without the aid of such invention it could not be effected.

According to the view which the court takes of the evidence, Bachelder & Thompson first successfully combined the two systems of brakes with each other and with the windlasses, so that all the brakes could be applied at either end of the car. This was their invention, secured by letters patent to Tanner. No one else had the right to take what may be termed the inventive principle of this combination, use it and evolve some-

thing different and better by additional devices for which last a patent could be sustained. This we think Stevens did. What he invented he has a right to retain under his patent, but he cannot use the invention of Bachelder & Thompson without the consent of the patentee or his assignee.

The court took this view of the case before, though the question of infringement was not specially pressed on the former argument, and the court, though it may be admitted it is a point of some nicety, has seen no reason to change its opinion.

It may be that the invention of Bachelder & Thompson, without the improvement of Stevens superadded, may not be of very great value, but that question is not now before us for decision. That will be considered when the proofs upon that point are taken and reported to the court.

Decree accordingly and reference to a master.

At the coming in of the Master's report, July 31, 1873, assessing the damages as against the Chicago and Northwestern R. R. Co., at $63,638.40, the defendant filed 13 exceptions, which are now (November, 1873,) on hearing before Judge DRUMMOND. This case is a test case, nearly all the railroads in the country being directly or indirectly interested in it.

[*Reporter.*

KINGSBURY vs KINGSBURY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JUNE, 1871.

REMOVAL FROM STATE COURTS.

1. NO JURISDICTION BY STIPULATION.—This court will not entertain jurisdiction of a case brought up by stipulation of parties from the State court unless the record shows the existence of the facts contemplated by the acts of Congress concerning removals from state courts.

2. APPLICATION FOR REMOVAL—WHEN TO BE MADE.—Under the act of 1789, the removal can only be made on application of the defendant at the time of entering his appearance in the State court.

3. *It seems*, that where a case has gone to decree in the state court it is too late for any of the parties to remove it to this court.

4. MINOR CANNOT CONSENT TO REMOVAL.—A minor is incapable of consenting to a change of forum. The state court having obtained jurisdiction of his person and property, neither his guardian *ad litem* nor any other person for him can consent to a removal.

The record in this case was transferred by stipulation of parties from the Circuit Court of Cook county to this court. The complainant, Jane C. Kingsbury, filed her bill in 1868 against the defendants, Henry W. Kingsbury, and Eva Lawrence, his mother, and A. G. Lawrence, the husband of said Eva Lawrence, praying for an assignment of dower in certain real estate situated in Chicago, of which Julius J. B. Kingsbury, husband of said complainant, died seized. Subsequently said Eva Lawrence filed her cross-bill against said complainant and Henry W. Kingsbury, also praying for an assignment of dower to which she was entitled as the widow of her former husband, Henry W. Kingsbury, who was the heir at law of said J. J. B. Kingsbury.

The record shows that such proceedings were had upon said bill, cross-bill and answers that said causes were finally brought to hearing upon the pleadings and proofs, and the

Circuit Court of Cook county made its decree adjudging said complainant, Jane C. Kingsbury, to be entitled to dower in one-third of said real estate, and said complainant in said cross bill, Eva Lawrence, to be entitled to dower in said premises, subject to the dower of the said Jane C. Kingsbury; and as the property was found not to be susceptible of division or assignment of dower therein to the respective complainants by metes and bounds, and to be also subject to incumbrances upon which interest was accruing, to be paid semi-annually, and also to large assessments and taxes the Circuit Court appointed a receiver, and decreed that he should collect the rents, issues, and profits accruing on the property, and out of the same pay, first, all taxes and assessments levied on said property, and the interest accruing upon the mortgages and incumbrances thereon, and the expenses of the repair and care of said property, and that the residue of the income from said property in the hands of said receiver should be, from time to time, divided in the proportion of three-ninths to said Jane C. Kingsbury, and two-ninths to said Eva Lawrence, in satisfaction of their respective dower rights in said property; and that the balance or remainder thereof should be paid to said Henry W. Kingsbury, or his guardian, or invested under the direction of the court for his use, as might from time to time be determined during his minority.

By stipulation of the parties in writing entered into between the said parties, Jane C. Kingsbury, Eva and Albert G. Lawrence, by their respective attorneys, and said infant, Henry W. Kingsbury, by his guardian *ad litem*, the cause was removed to and docketed in this court. This was a motion for the appointment of a receiver on the ground that the change of venue vacates all former orders made by the court in which the case was originally commenced.

Corydon Beckwith, *E. S. Isham*, and *Waite & Clarke*, for the motion.

M. W. Fuller, for the receiver of the State court.

BLODGETT, J.: In considering this motion, this court has deemed it first in importance to inquire whether it has acquired jurisdiction of said cause by the steps which have been taken for its removal from the state court.

By the act of March 2, 1867, it is provided "That where a suit is now pending, or may hereafter be brought in any state court, in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such state court an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, may at any time before the final hearing or trial of the suit, file a petition in such state court for the removal of the suit into the next Circuit Court of the United States to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court on the first day of its session copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts, as by the act to which this act is amendatory, are required to be done upon the removal of a suit into the United States Court; and it shall be, thereupon, the duty of the state court to accept the surety and proceed no further in the suit. And the said copies being entered as aforesaid in such court of the United States, the suit shall there proceed in the same manner as if it had been brought there by original process."[1]

By the act of 1789, providing for the removal of suits from the state courts to the federal courts, the application for the removal must be made by the defendant at the time of entering his appearance in the state court, and then only by the defendant. But as this case has progressed to a stage far

[1] 14 U. S. Statutes at Large, 558.

beyond the entry of the appearance of the defendants, it is obvious that if removed at all, it must be removed under the provisions of the act of 1867; and the act of 1867 only authorizes removals upon affidavit and petition showing the existence of such prejudice or local influence as will not secure to the party seeking the removal a fair trial in the state court. It is well known as a part of the legislative and judicial history of the country, that this latter statute was passed to meet certain conditions and difficulties which had arisen out of the late civil war. It is exceptional in its provisions, and it seems to us its application should not be extended beyond its letter and the class of cases which are strictly within its provisions. The statute itself provides for the filing of an affidavit and petition stating the existence of certain facts, and unless the existence of those facts appear in the record in the manner provided by the statute, it seems to us the right to a removal does not arise, and this court, it seems to us, ought not to entertain jurisdiction of a case from the state court, unless the record shows that the conditions precedent required by the statute have been complied with.

The stipulation in this case does not even by agreement of parties admit the existence of the jurisdictional facts which authorize the change of forum, even if it were allowable that the parties should stipulate as to the existence of those facts, instead of verifying their existence by affidavit as required. But without stopping to discuss the point as to whether parties might stipulate as to the existence of those facts, this court is of the opinion that the practice should not be encouraged or allowed of removing cases from the state courts by stipulation. We think that comity to the state court which has acquired jurisdiction over the persons and subject-matter in controversy, requires that the federal courts should refuse to take cognizance of cases removed therefrom, unless such removal is accomplished in the way pointed out by the act of Congress.

We also doubt whether this case has not already progressed to such stage in the state court as to be beyond the purview

and operation of the act of 1867. It seems to have passed to a final decree. The court has adjudicated upon the questions made by the bill and cross-bill, and has awarded to the complainants the relief they respectively sought, and the decree seems to have been in process of execution. We do not, however, feel called upon to decide the case upon that point, as there is another, and, to us, still more fatal objection to our entertaining jurisdiction in this case.

The record shows that the principal defendant in the original bill and in Mrs. Lawrence's cross-bill, is Henry W. Kingsbury, a minor. He is the owner of the fee in the property sought to be affected by the bill, and it is out of his estate that the complainants in the bill and cross-bill seek their respective allotments of dower. He is incapable of consenting to the change of forum in his case. The Circuit Court of Cook county has acquired jurisdiction of his person and property in these proceedings, and we do not deem it competent for his guardian *ad litem*, or any other person for him, to consent or stipulate for a removal of the case from that court into this court in his behalf.

It was said upon argument that inasmuch as it was possible for Mrs. Kingsbury and Mrs. Lawrence to dismiss their proceedings in the state court, and, if the proper facts in regard to the residence of the parties existed, bring an original suit against the minor defendant in this court, involving the same subject-matter, it was, therefore, competent for those having charge of his interests to stipulate for the removal of the case bodily into this court. But the obvious answer to that suggestion is, that in the event of bringing an original suit against the minor in this court, he could only be brought in as a defendant by service of process upon him in the manner pointed out by law, and that any waiver of service of process and entry of his appearance in this court by attorney or by guardian *ad litem* would be void and totally inoperative.

Entertaining these views, which are fully concurred in by my learned brothers, Justice Davis and Judge Drummond, the

motion for the appointment of a receiver will be overruled, and the order entered for the appointment of a guardian *ad litem* for the infant defendant set aside, and this case remanded to the Circuit Court of Cook county.

For opinion of Illinois Supreme Court in above case, upon the merits, consult 58 Illinois, 310.

For the circumstances under which cases can be removed under the acts of 1789 and 1867, and the time when it must be done, consult *Johnson vs. Morrell*, 1 Woolworth, 390, *Akerly vs. Vilas*, Volume 2 of this Series, p. 110, and cases there cited; also, *In re Cromie*, Id., 160; *Akerly vs. Vilas, post*, p. 332; *Boggs vs. Willard, post*, p. 256.

That consent will not give jurisdiction where none is conferred by law, consult *Andrews vs. Wheaton*, 23 Connecticut, 112; *Little vs. Sitts*, 33 Alabama, 343; *Harriot vs. The Railroad*, 1 Hilton, 262; *Green vs. Collins*, 6 Wendell, 139; *Branch vs. Houston*, 1 Bushee, 85; *Gilliland vs. Sellers*, 2 Ohio State, 227; *Smith vs. Dubuque*, 1 Clarke, 492; *Duffield vs. Smith*, 3 Sergeant & Rawle, 590; *Lindsey vs. McClelland*, 1 Bibb, 262; *Bents vs. Graves*, 3 McCord, 280; *Folby vs. People*, Breese, 31; *Falkenberg vs. Cramer*, Coxe, 31; *Parker vs. Munday*, Id., 70. But if a court has jurisdiction of the matter, and one party has some privilege which exempts him from the jurisdiction, he may waive that privilege if he chooses so to do. *Overstreet vs. Brown*, 4 McCord, 79. [*Reporter*.

TURRILL vs. ILLINOIS CENTRAL RAILROAD COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—NOVEMBER, 1867.

CAWOOD PATENT.

1. HELD VALID.—Letters patent granted to Joseph D. Cawood, September 9, 1856, for an "improvement in repairing railroad bars," examined and sustained, as being both new and useful.

2. The use by the defendants of the invention patented is evidence of its utility.

3. UNSUCCESSFUL COMBINATIONS.—Combinations of similar elements, which could not be *successfully* used to produce the effect produced by the patented machine, do not anticipate the patent.

4. A modification of the parts of a combination by which a new result is obtained may be the subject of letters patent.

This was an action on the case by Samuel H. Turrill and Charles Wormley, tried by the Court, Judges DAVIS and DRUMMOND, without a jury, to recover damages for the infringement of letters patent, granted September 9, 1856, to Joseph D. Cawood for an "improvement in repairing railroad bars," of which patent the plaintiffs were the assignees.

The disclaimer and claim of the patent was as follows:

"I do not claim the anvil bar or its recesses, but I claim the movable press-block D, having its edge formed to the side of the rail G, in combination with another block D, with its edge of a similar but reversed form, the movable block to be operated by two cams, or in any other convenient manner, for the purpose of pressing between them a T or otherwise shaped rail, thereby facilitating the difficult operation of welding or renewing the ends of such rails after they have been damaged, in the manner described and for the purpose set forth."

The facts and process are elaborately stated in the case of *Turrill vs. Railroad Company*, 1 Wallace, 491, and are also further stated in the opinion of the court.

Beckwith & Kales, *E. W. Stoughton*, and *B. R. Curtis*, for plaintiffs.

J. N. Jewett, *S. D. Cozzens*, and *J. H. B. Latrobe*, for defendant.

DRUMMOND, J.: This is an action at law against the defendants for a violation of a patent of the plaintiffs, which they hold as assignees of Joseph D. Cawood, and which was issued to him September 9th, 1856, for a new and useful improvement on the common anvil or swage-block, for the purpose of welding up and reforming the ends of railroad rails when they have become injured by wear. The questions of law and fact have by agreement been submitted to the court, and we have had all the assistance in their investigation which the very able arguments of counsel on both sides could furnish.

The patent has already come before the Supreme Court for examination, and a construction has been given to the specifications by that Court, which is a guide to us on this occasion. *Turrill vs. Railroad Company*, 1 Wallace, 491.

The specifications set forth the manner of constructing the machine. There is a bed-sill on which there is an anvil or swage-block of iron. There are dies across the face of the shape of the side of the rail. There is a raised solid block, making a part of the anvil. There is then a movable press-block operated back and forth by eccentric cams. The sides of the raised block and the movable press-block are made to fit and receive the rail, so that when they are pressed together by the motion of the press-block, they, in conjunction with the anvil beneath, hold the rail firmly for the purpose of welding and reforming the ends of the rails. The machine and its mode of operation are particularly described, the foregoing being a mere sketch.

The Supreme Court say in the case just referred to: "Obviously it is not a claim for any kind of movable press-block, combined and operating in any way with any kind of fixed block to accomplish any purpose or effect any kind of result. * * * The invention was of such a movable press-block as is described, having its edge formed to the side of the rail in combination with such other block as is described, with its edge of similar, but reversed form, arranged as described, and combined and operating in the particular way described, for the special purpose of effecting the described result."

With this construction of the patent before us, the inquiry is, whether any of the machines introduced by the defendants are substantially the same as that of the plaintiffs.

The infringement is admitted, but it is insisted that the machine of the plaintiffs, in all essential particulars, is identical with several machines previously well known, viz., the bayonet machine, as used in the United States armory at Springfield, Massachusetts, for the construction of bayonets, the angle iron machine, as used at Cincinnati, for the construction of the frames of locomotive engines; and the machine described in the English patent of William Church, issued in 1846.

The bayonet machine was one form of a common vise, operated by a treadle and elastic spring, the jaws of the vise having dies cut in them of the contour of that part of the bayonet and socket which they were to hold while the welding or hammering process was going on. If the machine of the plaintiffs was no more than this, then the patent would fail. We are inclined to agree with the defendants' witnesses, that as soon as the jaws of a vise are cut to the form of any instrument to be held, the idea would naturally be suggested that they might be changed to suit any shape. But the Cawood machine is something more than a vise with jaws shaped to receive the thing to be held. It has what is, in some respects, similar to the jaws of a vise adjusted to the thing, but there was a modification of some of the elements of the bayonet machine, so as to change the mode of operation and to produce a new result.

And to properly appreciate the difference, we must regard its adaptation of means to ends, and ascertain whether there is not something new, in this respect, in the patented machine. We think there is, and to hold otherwise would very much limit the field of discovery confessedly within some of the elements and combinations of the bayonet machine.

The angle-iron machine bears a stronger analogy to the Cawood machine. In the angle-iron machine there is the main anvil beneath, and above, a fixed anvil, and at the side of the latter, and upon the lower anvil, is a movable press-block.

The sides of the fixed anvil were rounded, and the two bars of iron were flattened or brought to any desired shape, and welded together by means of the fixed anvil and the press-block, the result of the hammering under these circumstances, being the welding of the iron, so as to produce the angle-iron, with a fillet, as it was termed, at the angle, thereby strengthening the iron to be used for the frame work of the locomotive. The press-block in this machine was moved towards the fixed anvil by a cam, but back by hand or other force in that way applied. Now, it is clear that this machine cannot be *successfully* used to produce the effect caused by the operation of the Cawood machine. In the latter the structure at the side of the anvil and press-block is different and adjusted to the rail. The rail in the act of hammering and welding is held by the press-block and raised solid block, and at the same time supported by the main anvil. The forming process is effected differently. In the angle-iron machine the relation of the parts of the machine to the thing to be constructed was not the same. The fixed anvil performed a different function, and the anvil beneath took no part directly in the working of the iron. The angle-iron machine would not effectually perform the function of mending rails. A change was made in that machine. There was a modification of some of the various parts, and in consequence of that, the other result is obtained. It may be said that the change here is not very great, and that the plaintiffs' patent has somewhat narrow ground to stand on; but not more

so, we think, than many patents that have been sustained by the courts. A slight change, sometimes, of a known machine, or in some of its parts, will effect surprising results, and to protect a party who, by inventing such change, has produced a new and useful result, was certainly one of the objects of the patent laws.

The English patent of William Church, though in one part it described a machine for holding railroad rails during a certain working process therein set forth, it is clear does not contain in substance the machine of Cawood, applying it to Church's specifications. There are jaws to hold the rail in Church's machine, and there is what has been termed the press-block, but it is manifest, we think, that it would not be a practical machine for producing the results effected by Cawood's; besides, there is no evidence before us that Church's machine has ever been used for any practical purpose having a bearing on the machine of the plaintiffs, nor, indeed, for any practical purpose whatever.

The question in this case is mainly one of fact, and we have not gone into details as to the differences between the three machines relied on by the defendants, and the Cawood machine, but have only referred to them in a general way. And we have rather given our conclusions than the reasoning upon which they are founded.

We have had the benefit of the testimony of several eminent experts, but, as is not uncommon in difficult cases, they do not agree in their opinions as to what are matters of form, and what matters of substance, and we have been obliged to draw our own inferences, aided by them and the arguments of counsel, chiefly from an inspection of the machines and the models which have been produced before us. And applying the construction of the plaintiffs' patent, as given by the Supreme Court to the three machines introduced by defendants, we think they are not substantially the same as the machine of the plaintiffs, and, therefore, that the Cawood patent is valid.

By stipulation between the parties, it seems there were

repaired, between August 20, 1860, and June 20, 1861, three thousand and forty-one bars of railroad iron, the average length of weld being 17.4 inches per bar. There is great conflict in the evidence as to the utility and value of the Cawood machine, as designed and used by the inventor, but we think the weight of the testimony is that it is both useful and valuable, and, indeed, under the circumstances, the defendants having made use of it so long, can hardly question it. On the whole, we have fixed the actual damages sustained by the plaintiffs for the infringement of their machine by the defendants during the time above-mentioned, at the sum of twelve hundred and ninety-two dollars.

DAVIS, J., concurring.

Judgment accordingly.

Consult the following case. [*Reporter.*

TURRILL vs. ILLINOIS CENTRAL RAILROAD COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JULY TERM, 1871.

IN EQUITY.

1. The Cawood patent for an improvement in anvil or swage-block for welding railroad bars construed and held valid.
2. The effect of removing the whole or a part of the anvil considered.

This was a bill filed by Samuel H. Turrill, as assignee of the Cawood patent for an accounting, and damages for an alleged infringement of the patent.

West & Bond, *B. R. Curtis* and *E. W. Stoughton*, for complainant.

J. N. Jewett, for defendant.

DRUMMOND, J.: This controversy grows out of an alleged infringement by the defendants of a patent granted to Joseph D. Cawood, on the 9th of September, 1856, for an improvement in the common anvil, or swage-block, for the purpose of welding up and reforming the ends of railroad bars when they have become injured from unequal wear, and of which the plaintiff is the assignee. This patent has been before the Supreme Court of the United States, and has, to some extent, at least, been construed, *Turrill vs. Railroad Company*, 1 Wallace, 491; in which case the specifications and claim are set forth. It has also been before this court, *ante*, p. 66. In this last case the law and facts were submitted to the court, and the patent was held valid, though attacked by the Angle Iron machine, the Bayonet machine, and the Church machine. The court was then of the opinion that there was nothing in

these old machines to prevent the operation of the patent of Cawood, as construed by the Supreme Court. It was admitted, in view of the previous machines, that the Cawood patent could not have a broad construction, but must be limited to such a movable press block as was described, or its equivalent, in combination with such other block as was described, or its equivalent, united and operated as described, and for the purpose described. In order to understand this definition, it is necessary to refer to the specifications. The movable press block described is put upon and connected with various other parts of the machine. There is, first, a bed sill of the proper size. Upon this is placed an anvil of cast-iron. There is a raised solid block forming a part of the anvil, with its side shaped to the side of the rail, which is to be placed in it. Then upon the face of the anvil, and next to the raised block, with its side shaped as above, is put the movable press block. It is attached to the anvil. It is worked by eccentric cams. It has its side next to the raised block, shaped also to hold the rail; the latter thus has the raised block on one side, and the press block on the other. This is the kind of press block described, and this is the kind of other block described. It operates in this way: The piece of iron is prepared and heated; the rail is also heated in the fire, and is then swung round; the movable block brought against the rail, which is thus between the two, as in the jaws of a vise, and there firmly held, with the crown of the rail above and resting on the blocks, until the welding or reforming process is completed. The purpose effected is the reparation of the rail. Now, it is clear that no true construction of this patent can be given, without connecting the claim as made, with the machine, and its purpose and mode of operation. Therefore, while it is essential that the various parts claimed should be constructed so as to accomplish the purpose, it is also essential that the parts claimed should be connected with parts not specifically mentioned in the claim; for example with something to support the jaws of the vise as well as the blows given in the act of reparation of the rail. It

is clear, therefore, the jaws as described and constructed cannot be separated from other parts mentioned in the specifications. If they are, they cease to be *such* a movable press block and *such* other block described, which are *the* blocks covered by the patent. It follows, therefore, that what gives support to the blocks is an essential part of the machine, and that it is not precisely correct to say that the only function of the Cawood machine is to hold the rail while being mended. That is only a part of its function. We must go further, and add, it must be done substantially in the way described, and so as to accomplish the purpose mentioned. It was, therefore, supposed by the court, in the case of *Turrill vs. The Illinois Central Railroad*, viewing the machine as having its own peculiar form and mode of operation, that there was something in it which might be the subject of a patent, notwithstanding the Angle Iron, Bayonet, and Church machines. A writ of error was taken out, and finally abandoned, and the judgment of this court affirmed. These questions have been re-argued in this case; but, under the circumstances, it could scarcely be expected that the opinion of the court would be changed. Cawood does not, in terms, in his claim, make the support to the jaws a part of his claim, but it necessarily follows, from the two things, that he does claim in combination, *in the manner described and set forth* by him, that it is an essential part of the invention. One of the blocks is a raised part of the anvil; the other is attached to it and movable backward and forward, so as to let in and firmly clasp the rail. If we were to remove the part beneath, we should deprive the machine of one of its essential parts, and without which it would not be the machine described.

Some question has been made whether Cawood intended that the rail, in process of reparation, should rest as well upon the anvil as be clasped in the jaws of the blocks. There is nothing distinctly stated in the specifications to that effect, but there can be no doubt, I think, when fairly considering them in connection with the drawings, that such was supposed by him to be one of the incidents or results, and, perhaps, a necessary one

to the successful operation of the machine. It would seem that in this way the rail would be more solidly planted, and, therefore, better prepared to receive the blow given in the act of repairing. It is insisted, on the part of the defense, that for the rail to rest on the anvil in the work of reparation is a positive injury, instead of a benefit, particularly in the case of what is called the "fish rail." The argument is that if the rest of the rail on the anvil is an element of the Cawood patent, then, whenever that ceases to be the fact, there is no infringement. And it seems that in several machines used by some of the defendants a part of the anvil has been chipped off beneath the rail, so that it no longer rests on the anvil. This, it is argued, deprives them of all that is new in the Cawood machine, and prevents them from being an infringement.

While I think the specifications treat the resting the rail upon the anvil as a part of its mode of operation, I do not consider that one of the elements or indispensable parts of the machine, nor, do I think, if enough of the anvil be removed to prevent the rail from resting on it, for that reason alone, it ceases to be the Cawood machine. And yet, it is clear, if the whole bottom support is removed, an essential part of the Cawood machine is gone, and there is nothing left, in effect, but a common vise. There might be instances between these two supposed cases where it would be difficult to determine whether the machine was a substantial equivalent of one of the old or of the Cawood machines. It would appear to be better, in order to accomplish the purpose Cawood had in view, that the rail should rest on the anvil, but it might not, and still it would possess, in many respects, the peculiar advantages of the Cawood machine; one of them, obviously, being the firmness of support given to the rail while in the act of being repaired. The fact that the machine, as intended by Cawood, has been used, and, by some of the defendants, several years, without special complaint, strengthens this view of the case. But even if what is added or taken away by the defendants is an improve-

ment of the Cawood machine, it is still the machine so long as its essential characteristics remain the same.

On the whole, then, there is nothing in this case to prevent the operation of the Cawood patent, when fairly construed, and therefore it will be held valid. The main argument has been upon the validity of the patent. I shall refer the case to a master, with directions to report what machines used by the defendants infringe the patent of the Cawood machine, within the rules and principles here stated; also, what damages the plaintiff has sustained by such use. I adopt this practice in the present case for the reason that while the rules laid down dispose of most of the questions which relate to infringement, there are others of some difficulty which I leave to be disposed of at the coming in of the master's report upon exceptions or otherwise.

The above opinion applies not only to Mr. Turrill's suit against the Illinois Central Railroad Company, but also to four other suits against the following companies: The Chicago, Burlington and Quincy R. R. Co.; the Michigan Southern and Northern Indiana R. R. Co.; the Chicago and Alton R. R. Co.; the Pittsburgh, Ft. Wayne and Chicago Railway Co.; all being founded upon essentially the same state of facts, and involving the same principles. These five cases were, by agreement of counsel, heard together, and in accordance with the above opinion were referred to Henry W. Bishop, Esq., Master in Chancery. The Master, on the 7th of November, 1872, reported that the defendants used seven machines which infringed the plaintiff's patent, and reported the damages as against the several defendants at a total of $1,549,732.68.

To this report the defendants filed thirty-two exceptions, which came on to be heard before Judges DAVIS and DRUMMOND, in July, 1873, when the report was sustained except as to the Bain machine, and reference made to the Master for the proper reduction. The opinion of the court on this hearing will appear in subsequent Volume of these Reports.

The Master, on the 22nd of October, 1873, reported that the Illinois Central and the Michigan Southern and Northern Indiana R. R. Co. were the only ones which used the Bain machine, and allowed them deductions of $114,489.68 and $103,927.53, respectively, making the total amount against the five companies $1,331,315.47. To this report the several railroad companies filed further exceptions, which have recently been argued, and are now (November, 1873,) under advisement by Judge DRUMMOND. [*Reporter.*

BLAKE vs. EAGLE WORKS MANUFACTURING COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JULY TERM, 1871.

IN EQUITY.

1. VALUABLE PATENT—NOT INVALIDATED BY LOOSE TESTIMONY.—A patent for a valuable machine should not be invalidated by the uncorroborated testimony of a single witness, stating that he saw a similar machine in operation in a large city twenty-two years previously.

2. VARYING MODE OF CONNECTION DOES NOT ESCAPE INFRINGEMENT.—The patentee having produced important results by the combination of the various parts of his invention, varying the mode of connection without changing the principle, does not escape infringement.

3. Letters patent for "improved machine for breaking stone" re-issued to Eli W. Blake January 9, 1866, examined and sustained.

This was a bill in equity to restrain the defendants from infringing letters patent for an "improved machine for breaking stones" granted to Eli W. Blake June 15, 1858, and re-issued January 9, 1866. The facts and the claims in the patent appear in the opinion, and are also fully stated in *Blake vs. Stafford*, 3 Fisher, 294.

H. T. Blake, and *S. A. Goodwin*, for complainants.

George Scoville, and *George Gifford*, for defendants.

DRUMMOND, J.: This is a bill filed by the complainants as inventors of and assignees of a patent for an improved machine for breaking stone, Eli W. Blake, one of the complainants, claiming to be the inventor and the patentee. The patent has heretofore been before the courts and sustained[1] by

[1] Blake *vs.* Stafford, 3 Fisher, 294.

SHIPMAN, J., and afterwards, on a motion for a new trial overruled by Mr. Justice NELSON, of the Supreme Court of the United States. It is claimed that there were some errors of fact committed by the court in the description of some machines then before that court, and now before this. However that may be, I do not understand that the counsel for the defense very seriously contest the validity of the patent on the ground that its subject-matter was wholly covered by previous machines, unless it may have been by that of Forward, referred to by the witness Johnson as having been constructed in Louisville, Kentucky, in 1847.

The examination of the specifications of the patent and the mode of operation of the machine described, together with a comparison of the various other machines with that of the patentee, which have been introduced in evidence, and which, it is claimed, anticipate it, have left no doubt in my mind, not only of the validity of the patent, but of the great value of the machine itself.

The only testimony in relation to the Forward machine is given by one witness, James B. Johnson, who was examined before an examiner upon interrogatories sent to California in 1869. He says he made the pattern in the summer of 1847 for the castings of the machine, and assisted in its construction, and afterwards made a model in contemplation of Forward's application for a patent. Annexed to his deposition was a pen sketch of the machine, which he describes. He says: "I saw the machine in actual operation several times, and it did good service in crushing stone for macadamized roads, for which it was designed. I left Louisville in October, 1850, and have never heard of the machine or model since." This witness recounted his recollection of what took place twenty-two years before. He made his sketch and gave his description, not having seen the machine or the model, or even heard of them for twenty years or more. The machine was said to have been built in Louisville, a large town, and if it operated publicly in macadamizing roads, it must have been

known to many. It is difficult to realize that if such a machine —one that it is said in all essential particulars anticipated that of Blake—had been constructed and publicly used, all traces of it would have been lost, except what remains in the memory of one witness. No patent was ever applied for, and no such machine ever came into use in Louisville or elsewhere, so far as this case shows. It is not claimed that Blake ever heard or knew of this machine. I do not feel inclined to invalidate a patent on such testimony as this. I think the defense, under the circumstances, should have introduced some additional and corroborative testimony in relation to this solitary machine. It is the less worthy of confidence because Blake's machine, which it was said to anticipate, was one of great value. The only question, therefore, is whether the defendants have infringed the patent of Blake, and to some extent that involves its construction.

The re-issued patent consists of three claims. The first two only are involved in this controversy. The patentee gives this general description of his machine:

"My stone-breaker, so far as respects its principle, or its essential characteristics, consists of two jaws between which the stones are to be broken, having their acting faces so nearly in an upright position that stones will descend by their own gravity between them, and convergent downwards, one towards the other, in such manner that while the space between them at the top is such as to receive the stones that are to be broken, that at the bottom is only sufficient to allow the fragments to pass when broken to the required size; and of a revolving shaft driven by steam or other power, which is made to impart to one of these jaws a continual vibratory movement, causing it to alternately advance toward and recede from the other jaw through a short and definitely limited space; hence when the shaft is revolved and a stone is dropped into the space between the jaws, it falls down until its further descent is arrested between their convergent faces; the movable jaw advancing, crushes it, then receding, liberates the fragments and they

again descend, and if too large are again arrested and crushed, and so on until all the fragments, having been sufficiently reduced, have passed out through the narrow space at the bottom."

After giving a minute description of the various parts with reference to drawings, he presents, as his first two claims:

"I. The combination, in a stone-breaking machine, of the upright convergent jaws with a revolving shaft, and mechanism for imparting a definite, reciprocating movement to one of the jaws from the revolving shaft, the whole being and operating substantially as set forth.

"II. The combination, in a stone-breaking machine, of the upright movable jaw with the revolving shaft and fly-wheel, the whole being and operating substantially as set forth."

Does the defendants' machine infringe these claims, or either of them? It is double, having a movable jaw in the center and a fixed jaw on each side. thus forming a double crusher instead of one. The defendants' counsel admit that it has the revolving shaft, the pulley, the crank and the fly-wheel of Blake's machine, but deny that it has the jaws, the toggle mechanism or the spring described or claimed in Blake's patent.

The difference between the double and single jaw is not insisted on. The jaws of the Blake machine are straight and corrugated, the corrugations running vertically, and there can be no doubt the patentee intended the machine should be so constructed and used, and that without such structure it would be less efficient.

In the defendants' machine the jaws are all curved, the stationary jaws smooth, without corrugations or teeth, and the movable jaw has what are called upright corrugations, but which may properly enough be called vertical. Such a modification as this by the defendants in the form of the jaws does not of itself destroy its identity with the Blake machine. It is not a substantial change.

Instead of the toggle mechanism of the Blake machine by

which the crank shaft is connected with a movable jaw, the defendants use a rod and lever to produce the connection; but it seems to me that when Blake constructed his machine, and thus produced such important results by the combination of the various parts, it was competent for mere mechanical skill to vary the mode of connection in different ways without changing the principle of its construction and combination, even though it might be true that one method—such as that of the defendants—might involve a loss of power and a gain of a quicker action.

And I think the defendants' machine has something different in its structure and mode of operation from the Hamilton and the other old machines which have been introduced in evidence, and which it has borrowed from Blake's machine.

On the whole, therefore, I conclude that the defendants infringe the first two claims of the Blake patent, and the decree of the court will be accordingly.

Injunction granted.

UNION NATIONAL BANK vs. CITY OF CHICAGO.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—AUGUST, 1871.

IN EQUITY.

STATE TAXATION OF NATIONAL BANK SHARES.

1. JURISDICTION OF FEDERAL COURTS.—Under the fifty-seventh section of the National Currency Act of June 2, 1864, suits may be maintained *by*, as well as against, National Banks, in the United States Courts of the district of their location.

2. Though Courts of Equity will not enjoin the collection of taxes, on the *sole* ground of their illegality, the prevention of a multiplicity of suits, or of injury for the redress of which the remedy at law is not so certain, adequate, and complete as in equity, will sustain jurisdiction.

3. SHARES MUST BE ASSESSED AT PAR.—National Bank shares cannot be included in the valuation for taxation by or under State authority at more than the par value thereof; the par value is the fixed value for taxation.

4. The reason is, that under the National Currency Act, as construed by the Supreme Court of the United States, the limited State taxation permitted is one of the conditions annexed to the grant of the franchise, and the shares are subjected to it without regard to the capital, property, or investments of the bank, and, therefore, such taxation is in the nature of a royalty upon the nominal value of the share.

5. TAXES—WHEN VOID.—Such taxation above the par value is not merely an irregularity, but renders the whole tax inoperative and void. Taxes levied in the absence of persons or property, are *ultra vires* and void. Jurisdiction is as essential to valid legislative as judicial action.

6. SHARES.—Shares of stock represent a property interest, separate from the capital and property of the corporation, and, being incorporeal and intangible, are incapable of having an actual *situs*, save at the owner's domicil.

7. STATUTE CONFLICTS WITH STATE CONSTITUTION.—The State law of June, 13, 1867, conflicts with the State Constitution of Illinois, because it directs taxes to be assessed by the authorities of counties, towns, cities, and districts, upon the shares of the banks in the county or town where

the bank is located, without regard to the residence of the owner, or the *situs* of the shares.

8. TAXATION NOT UNIFORM IS VOID.—Such taxation, being void as to all shareholders not residing in the district where the bank is located, is also void as to those who do reside there.

9. VOID AS TO NON-RESIDENTS.—And if the law be not valid as to residents of the State, the shares of non-residents cannot be taxed under it, as that would be in contravention of the laws of Congress, and the Federal Constitution.

These were ten bills in equity filed by the Union National Bank of Chicago, and nine other National Banks, against the city of Chicago, and the city collector, to restrain the collection of the city tax upon the capital stock of the respective corporations for the years 1867 and 1870.

The averments of the bills were substantially the same in all cases; that the complainants are banking associations created under, and existing and doing business in the city of Chicago, by virtue of the Act of Congress, approved June 3d, 1864, commonly known as the "National Currency Act;"[1] that the authorities of the city of Chicago, assuming to act under and by virtue of the charter of said city, and in accordance with and by virtue of an act of the Legislature of the state of Illinois, entitled "An act to provide for the assessment and collection of taxes on the shares of capital stock in banks and banking associations," approved June 13, 1867,[2] levied a tax for municipal purposes upon all the shares of the capital stock of the complainants, such tax being at the rate of fifteen mills on the dollar of the value of said shares, said value being fixed by the assessor of the South Division of the city of Chicago, and that the collector, by virtue of his tax warrant, demands of complainants the aggregate amounts of said tax, to be deducted from any dividends which may be declared upon their capital stock, and threatens to sell said

[1] 13 U. S. Statutes at Large, 99.
[2] 1 Gross, 618.

shares of stock by virtue of his warrant, unless his demand shall be complied with.

The bills also state that in the assessment roll of personal property in the South Division of the city of Chicago, upon which the tax is levied, and in the collector's warrant, the names of all the holders of shares of capital stock are stated separately, and opposite thereto, in appropriate columns, are given the places of residence of the different shareholders, the number of shares held by each, and the assessed value thereof, showing that a number of the stockholders do not reside in the South Division of the city of Chicago, where the banking association is located.

The complainants claimed that the tax referred to was illegal and void for the following reasons, viz.:

1st. Because it was levied in the absence of the stockholders of the bank not residing in the South Division of the city of Chicago, and no jurisdiction was ever obtained of them or of the shares of stock held by them.

2d. Because the act of the Legislature of the state of Illinois, approved June 13th, 1867, in accordance with which said tax is pretended to be levied, is void, as being contrary to the Constitution of the United States, and the acts of Congress for the creation and control of National Banks; and

3d. Because said act of the Legislature is contrary to Article 9 of the Constitution of the State of Illinois.

The special grounds for relief in equity were, that the stockholders refuse to pay said tax, and forbid its payment, threatening a multiplicity of suits against the banks in case the amount of the tax should be paid and deducted from dividends to be declared; and that, upon the other hand, if a sale should be permitted to be made by the collector, as threatened, irreparable damage will result to the bank and its stockholders, for which a suit at law would afford no adequate remedy; and that, in either event, a multiplicity of suits will be prevented by a determination in equity of the question of the liability of the banks and their stockholders to pay the tax.

The defendants filed demurrers to the bills on the several grounds stated in the opinion. By agreement of counsel, all the cases were heard together, upon motions for injunctions.

Melville W. Fuller, for the complainants, argued in support of the injunction upon the following points and authorities:

I. This court has jurisdiction. *Gibson vs. Kennedy*, 8 Wallace, 498.

II. Grounds of equity interposition exist. *Dows vs. City*, 11 Wallace, 108.

III. The warrant for 1867 has long since expired, and the present collector cannot execute it. The demurrer admits this.

IV. The levy for the taxes of 1867 is void because value and ownership of shares for that year were referred to a different point of time than that to which all other personal property was. [This was elaborated at length with full citation of authority.]

V. The act of June 13th, 1867, is unconstitutional and void. Shares of stock are incapable of *situs* save at owner's domicil. *Williams on Personal Property*, 191; *Angell & Ames on Corporations*, § 458. It is not within legislative authority ordinarily to tax shares of non-residents. *Union Bank vs. State*, 9 Yerger, 490; *State vs. Ross*, 3 Zabriskie, 517; *Connell vs. Connersville*, 15 Indiana, 150; *Dwight vs. Mayor*, 12 Allen, 322; *McKeen vs. Northampton Co.*, 49 Pa., 519. The taxing power can only be exerted upon persons and property within its jurisdiction, In the case of non-residents, neither persons nor property within jurisdiction. As to National Bank shares this is otherwise, (*Brightley's Digest*, vol. 2, pp. 56, 57,) but residents can only be taxed in such *manner and place* as *may be lawful*, which is in the manner and for the purposes designated in the state constitution. Personal property having *actual situs* in the city of Chicago can alone be taxed. *Appendix Public Laws*, 1867, p. 5. In Illinois the constitutional rules of taxation are: 1st. That taxes shall be by valuation, so that every person or corporation shall pay a tax in proportion

to the value of his or her property. 2d. And taxes shall be *uniform* in respect to persons and property within the jurisdiction of the body imposing the same. *State Constitution*, article IX, sections 2 and 5. These provisions are *restrictions*. 51 Ill., 130; 34 Ill., 267; 42 Ill., 9. The act of June, 1867, conflicts with the constitution because it directs taxes to be assessed without regard *to the residence of the owner, or the situs of the shares*. This is in disregard of the rule of uniformity in respect to persons and property within the limits of the county, city, town, or district of the shareholder's residence, when other than that of the bank's location, (12 Ill., 140; 25 Ill., 561; 30 Ill., 146,) and being void to this extent, it is void as to shareholders residing in the place where the bank is; and if as to all residents is as to non-resident shareholders. *Van Allen vs. Assessors*, 3 Wallace, 579; *Constitution of the United States*, art. 4, § 2. See 2 Kent's Commentaries, 333; *Taxation of National Banks*, 53 Maine, 594; *Markoe vs. Hartranft*, 6 American Law Register, (N. S.) 490; *Austin vs. City of Boston*, 14 Allen, 364; *Clapp vs. City of Burlington*, 42 Vermont, 579. Jurisdiction is as essential to valid legislative as to judicial action; *St. Louis vs. The Ferry Co.*, 11 Wallace, 430. The requisite legislative jurisdiction does not exist as to non-residents where the property is *in itself* incapable of an actual *situs; Railroad Co. vs. Jackson*, 7 Wallace, 266; *City of Dunleith vs. Reynolds*, 53 Illinois, 45; *St. Louis vs. Ferry Co.*, 40 Missouri, 580; Cooley's Constitutional Limitations, 500. The corporation receives the benefit of protection where it is located, and might well enough be there taxed, but that is merely an argument against the policy of exempting the bank. As to the shareholder, he is taxed where he resides and receives the income from his share. The immediate right to receive dividends, and the remote right to share on winding up, is all a stockholder has. *Union Bank vs. The State*, 9 Yerger, 501; *Fisher vs. Essex Bank*, 5 Gray, 373. Residents are subject to taxation upon shares in foreign corporations, and non-resident holders of shares of Illinois corporations are so

subjected in their own states. To authorize taxing the latter here is double taxation, and so if other states pursue that rule as to our citizens. The adverse argument is: 1. That the General Assembly has power to give bank shares an *actual situs* for taxation. 2. That by the act of 1867 this has been done. But the answer is, that it has not and cannot be done. The levy and collection of taxes is a proceeding either *in personam*, or *in rem*. The act of 1867 provides purely for levy and collection *in personam*, except as to non-residents. Decision in *National Bank vs. Commonwealth*, 9 Wallace, 353, shows that *state* taxes might be collected at place of bank's location, by a proceeding equivalent to one *in rem*, in the nature of a garnishee process, and sustained by that analogy. Under our system, moneys, credits, and effects are taxed *in personam*. The warrant is a lien on *all* the owners personalty, *Hill vs. Figley*, 23 Illinois, 420. The act of 1867 provides for proceedings *in personam*, and does not purport to change the *situs* of bank shares, which is only material where the proceeding is *in rem*, and the *res* proceeded against the shares themselves. It is true a mode of reaching shares for taxation at the place of the bank's location might be devised, but tangibility cannot be imparted to that which is intangible. The rule that personal property follows the person of the owner is *only a fiction* when the property is itself capable of an *actual situs*, because then *the fact* is contrary to the rule; but as to stock, the rule is founded on the fact, or rather it is the fact, and not the rule, which settles the question. In the original charters of corporations it might be provided that shareholders should take *cum onere*, that they could exercise the rights arising upon their shares only in the place of the location of the corporation, but unless this were so originally provided, the obligation of the contract would be impaired by any subsequent legislative attempt to accomplish it. Congress, as to corporations created by it, can establish a uniform rule excluding taxation elsewhere than as designated, *but state legislatures cannot. Redfield, Supplement to Law of Railways*, p. 493.

VI. The shares cannot be taxed above the par value thereof. *Van Allen vs. The Assessors*, 3 Wallace, 573; *Bank of Commerce vs. New York City*, 2 Black, 620.

M. F. Tuley, corporation counsel, for defendants.

BLODGETT, J.: A preliminary objection is raised on behalf of the defendants, that as the banks are located in the Northern District of Illinois, and the defendants also reside there, the court has no jurisdiction to entertain these suits. It has, however been decided by the Supreme Court of the United States in *Kennedy vs. Gibson*, 8 Wallace, 498, that under the 57th section of the National Currency Act, suits may be brought *by*, as well as *against*, associations organized under that act, in the United States courts of the district in which such associations are established. It is true that the word "by" is omitted from the text of this section, but the court hold that reading the section by the light of another of a prior act on the same general subject, the omission is to be regarded as an accidental one. This court can not therefore decline to take jurisdiction because these banks are established, and the defendants reside, in the same district.

It is further objected that these bills are improvidently filed in view of the rule laid down in *Dows vs. The City of Chicago*, 11 Wallace, 108, that a suit in equity will not lie to restrain the collection of a tax on the *sole* ground that the tax is illegal, but there must exist, in addition, special circumstances, bringing the case under some recognized head of equity jurisdiction. Conceding this to be so, it is not decisive of these cases, as the question still remains whether any such ground of equity interposition is shown to exist here. And it appears to me that such grounds do exist.

The banks occupy, as it were, the position of stakeholders. They are the custodians of the property, money and funds of the shareholders, when the latter become entitled thereto, as in case of the declaration of dividends. The shareholders

insist that their dividends shall be paid to them. The collector demands that they shall be paid to him, or a sufficient amount thereof to defray the taxes. And the banks invoke the aid of a court of equity to determine to which of the parties the funds belong or should be paid. They assert, and the bills upon this motion are to be taken as true, that they are notified by their shareholders that if they pay these taxes suits will be commenced at once against them. At the same time, if they do not, the state law not only, at least so far as non-resident shareholders are concerned, undertakes to make their officers personally responsible for the amount, which would be, perhaps, immaterial if the assessments be invalid, but the collector threatens to sell the shares to make the taxes therefrom.

It is obvious that the latter course, if taken, would operate to prejudice these corporations in the public mind, and lead to further and harassing litigation, working that kind of injury to the corporation which, because the law affords no such beneficial and complete remedy for it as the nature of the case requires, may be deemed irreparable.

Reference to the case of *Dows* confirms this view. Mr. Justice FIELD, in delivering the opinion, says in regard to the cross-bill filed by the bank in that case, that it presents different features from those of the original bill.; that the bank "insists that if it paid the tax levied upon the shares of all its numerous stockholders out of the dividends upon their shares in its hands, which it is required to do by the law of the state, or if the shares were sold, it would be subjected to a multiplicity of suits by the shareholders, and were it an original bill the jurisdiction of the court might be sustained on that ground." This clearly intimates the judgment of the Supreme Court upon this branch of the case, and is, to such an extent, authority in favor of the jurisdiction, that I feel bound to follow it.

I find myself compelled then to pass upon the validity of the taxes in question. Courts interfere with the collection of taxes with reluctance, but when questions directly calling for

judicial action are presented, there is no alternative but to decide them, although they may involve the legality of revenue proceedings. The provisos to the 41st section of the National Currency Act of 1864 are as follows:[1]

"*Provided*, That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority, at the place where such bank is located and not elsewhere; but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state: *Provided further*, that the tax so imposed under the laws of any state upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located. *Provided also*, that nothing in this act shall exempt the real estate of associations from either state, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed."

And by the 1st section of the act of February 10, 1868,[2] the words "place where the bank is located, and not elsewhere," are declared to mean "*the state* in which the bank is located," thereby localizing the authority imposing the tax, but not the assessment of taxes at the place of the location of the bank. It is subject to these limitations that taxes may lawfully be levied by or under state authority.

In three of the cases before the court, complainants insist that the assessment of taxes attempted to be made upon their shares is illegal and void, because the municipal authorities charged with the duty of assessing taxes have placed those

[1] 13 U. S. Statutes at Large, 112.

[2] 15 U. S. Statutes at Large, 34.

shares in the valuation for taxation at a sum above the par or denominational value thereof, varying from ten to twenty per cent. And the question is, can national bank shares be valued for taxation at a higher valuation than the par value of the share?

In *Van Allen vs. The Assessors*, 3 Wallace, 573, it was insisted that in levying taxes upon the shares of national banks, regard should be had to the fact that a part or the whole of the capital of such associations was invested in national securities, declared by the statutes authorizing them to be "exempt from taxation by or under state authority."

In the dissenting opinion of the Chief Justice (WAYNE and SWAYNE, J. J. concurring), the position is ably argued that these shares can not be subjected to taxation by the state, irrespective of the mode of investment of the capital in securities exempted from taxation, and the Chief Justice, *inter alia*, says that what the assessor would have to do is "to ascertain the value of the whole property of the association, and deduct the amount of bonds. The remainder, divided by the number of shares, would give the value of each share to be taxed, and the assessor must value the whole property and divide it by the number of shares, in order to make a true valuation of shares. If he does not do this, he must assess the shares at an arbitrary or speculative valuation. This is not what is required. The law demands true valuation; and true valuation, with deduction of bonds, places the shareholder on exact equality with the holder of other moneyed capital, which the law also demands. No other mode of valuation secures that equality."—p. 601.

The majority of the court, however, held that the limited state taxation allowed by the act was but a condition annexed to the enjoyment of the new use and application of the United States bonds, to which they were enabled to be put under the grant of the franchise, and imposed as a burden thereon, and in that aspect, that the interest of the shareholder could be taxed within the limit of the act without reference to the property and capital of the bank; and the learned Judge, NELSON,

who delivers the opinion, reviews the various sections of the law to sustain this proposition.

The conclusion reached and the reasoning upon which it rests, taken in connection with the language of the dissenting Judges, leave no doubt in my mind that the court regarded the tax as in the nature of a royalty for the grant, annexed to the franchise. The ruling is distinctly that taxes by the state are permitted to be imposed wholly irrespective of the character or description of the property or capital of the bank; and this being so, it logically follows that the par value of the share is the fixed value for taxation, whether the shares may be said to have an actual value above or below the nominal amount. These bills allege that the shares in these instances have no market value, and that the assessing authorities have affixed a valuation higher than par, arbitrarily and without resort to any basis of values whatever. It is clear that this cannot be done, and, as we have seen, it is equally true, under the decision just referred to, that the values cannot be determined by reference to the capital, property and investments of the bank; for if this were so, then the deductions must be allowed, which the Supreme Court has held cannot be done for the reasons given. Reference to the different sections of the act confirm this view. They provide for a certificate of the numbers of the shares; the division of the capital stock into shares of one hundred dollars each; the personal liability of the shareholder to an amount equal to the sum invested and the par value of the shares held; the casting of one vote for each share; the payment in of the amount of the share in specified installments; a list of the number of shares held by each shareholder, open to the inspection of state tax assessors, etc., etc., and the term "share" is used throughout in the same signification. The personal liability clause is, perhaps, as noticeable as any other, in the way of illustration. The shareholders of the association are held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the amount of their stock

therein *at the par value* in addition to the amount invested in such shares. This provision is not of itself conclusive, but it bears with much weight in favor of the position, and other provisions might be cited more at length than has been done, as tending to sustain it.

It could never have been intended that the assessing authorities should be permitted to exercise an arbitrary and unlimited discretion, and it seems to me that the whole tenor of the act, and of the decisions of our highest judicial tribunal upon questions arising under it, satisfactorily indicate that the state authorities have no power whatever to tax these shares above the value thereof, as fixed by the act itself.

The error in these cases is a fundamental one. It is not a mere irregularity. It goes to the very foundation of the tax, and renders it wholly inoperative and void.

It is also claimed, in all these cases, that the tax attempted to be levied for the year 1867 is void because of the invalidity of the state law of June 13, 1867.

Other objections to the legality of this tax are urged, but the view which I take of the main question renders their consideration unnecessary.

I may remark, however, in passing, that I do not, as at present advised, perceive how the present City Collector can lawfully proceed upon the warrant issued in 1867. These warrants stand upon the same principle as writs of *fieri facias*, and it would seem that the common law rule, that the officer receiving the process to execute should complete it, applies. But I need not dwell upon this point, as it becomes immaterial under the circumstances.

The validity of the law of 1867 is questioned upon the ground that its provisions are in contravention of the State Constitution. The law was passed, and the assessment of taxes complained of made, under the Constitution of 1848.

Sections 2 and 5 of Article IX of that instrument are as follows:

"2. The General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property." * * * *

"5. The corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be *uniform in respect to persons and property*, within the jurisdiction of the body imposing the same. And the General Assembly shall require that all the property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law."

And by a series of adjudications of the Supreme Court of Illinois, it has become settled law that these provisions are *restrictions* upon the power of taxation by the Legislature, or any authority under it. All taxes, therefore, assessed by municipal corporate authorities, must be proportionate and uniform within the jurisdiction of the body imposing them. Where there is jurisdiction neither of persons or property, the imposition of a tax would be *ultra vires* and void. Jurisdiction is as necessary to valid legislative as valid judicial action.

Shares of stock are incorporeal personal property, and as such are held incapable of having any *situs*, save at the domicil of the owner. In the eye of the law they have in themselves no locality. They accompany the person of the owner where he goes, and he may deal with them and dispose of them according to the law of his domicil, which, if he die intestate, governs their disposal.

The peculiar character of this class of property is adverted to by Mr. Justice NELSON in the case of *Van Allen*, already cited. He says: "A striking exemplification may be seen in the case of *The Queen vs. Arnoud.*[1] The question related to the registry of a ship owned by a corporation. Lord DENMAN observed: 'It appears to me that the British corporation is, as such, the

[1] 9 Adolphus & Ellis, (N. S.) 806.

sole owner of the ship. The individual members of the corporation are no doubt interested, in one sense, in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease, but in no legal sense are the individual members the owners.' "

The shareholders are not the owners of the bonds, investments, surplus and property of the bank. They possess only the intangible right to the dividends, if any, upon their shares, and to the residuum upon the winding up of the corporation. The distinction between such a right and personal property capable of an *actual situs* is obvious. And it is a distinction which seems to have been borne in mind in the enactment of the city charter which provides for the taxation only of such personal property as has its *actual situs* within the city, and further, that state laws then in existence, or which might afterwards be adopted, shall govern in municipal assessments, unless *in conflict* with the provisions of the charter.

The act of June 13, 1867, directs taxes to be assessed by the authorities of counties, towns, cities and districts upon the shares of these banks in the county or town where the bank is located, without regard to the *residence of the owner or the situs of the shares*, and in that respect I regard it as a violation of the constitution of the state.

The complainants show, and it is not denied, that their shareholders are scattered over the state, and through other states, and such taxation upon them appears to me a clear infringement of the constitutional requisition that all assessments by the corporate authorities of cities, etc., shall be uniform in respect to persons and property within their limits. This compels the taxation of the stock owned by residents of the state in the county, city, town or district where they reside, for the purpose of collecting county, city, town or district taxes, and a failure to do so destroys the rule of uniformity with respect to property within the limits of the body imposing the taxes, while neither the persons nor property are within the jurisdiction of the taxing power at the place of the bank's

location. If, then, this statute is void as to those who do not reside in the district where the bank is located, it must be so as to those who do, because it would be then undeniable that every person would not be obliged to pay a tax in proportion to the value of his or her property, and the taxes for state purposes would not be levied with uniformity. And if the law be not valid as to shares of stock belonging to residents, the shares of non-residents cannot be taxed, because the provisos of section 41 of the act of 1864, inhibit any tax upon non-residents that is not imposed upon residents of the state, and such a regulation would be in conflict with the Federal Constitution, which says, "the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states."[1] I cannot avoid the conclusion that this law violates the imperative rule of the Constitution.

It ought to be observed that, when the Act of June, 1867, was passed, controversy had arisen as to the meaning of the words in the provisos to the 41st section of the law of Congress, that the shares should be assessed "at the place where the bank is located." The language of the proviso is not perspicuous, and I am inclined to think that the framers of this law supposed Congress to have required the shares to be assessed in and for the benefit of the taxing district of the bank's location. It is not unnatural that this view should have been entertained. Courts of the highest respectability arrived at this conclusion, as in Maine and New Hampshire, while others, as in Massachusetts and Pennsylvania, were of a different opinion. In Massachusetts, the law for the assessment of national and other bank shares, provided that this should be done at the residence of the respective shareholders, and the question was raised, that this was contrary to the proviso of the 41st section; but the Supreme Court of the state held otherwise, and their judgment was affirmed by the United States Supreme Court, though upon another ground. The

[1] Art. iv, § 2.

subsequent action of Congress by the passage of the law of February, 1868, confirmed the correctness of the views of the Massachusetts court, and resolved the doubt in favor of the position that the intention was to localize the authority imposing the tax, and not the assessment of taxes at the place of the location of the bank.

The anomalous provision in the Illinois Act of 1867, which gives the collector of the particular taxing locality a kind of "roving commission" to execute his warrant anywhere within the limits of the state, is a sufficient indication of the embarrassment that was felt by the General Assembly in framing this enactment.

The defects, however, may be readily remedied by the state legislature. Upon the argument of these applications, it appearing that the questions involved were of sufficient importance to demand, and both parties being desirous of obtaining, the decision by the tribunal of last resort, and there being apparently no substantial dispute as to the facts, I suggested to counsel the propriety of making an agreed case, that a final result might be obtained as speedily as possible; but, as the suggestion was not acted on, I have, in the discharge of my judicial duty, passed upon the questions myself, so far as necessary to determine these preliminary motions.

The injunctions, as prayed, will be granted.

After this decision by Judge BLODGETT, the Supreme Court of Illinois considered this question in *First National Bank of Mendota vs. Smith*, 5 Chicago Legal News 253, and held that this taxation was legal and constitutional; that the Legislature had the right to fix the *situs* of incorporeal property, such as bank shares; that the act of June 3, 1867, violated neither the uniformity nor equality of taxation, and was a proper and necessary exercise of the legislative power. The court refused to concur in the views of the United States Circuit Court for the Northern District of Illinois.

Upon the rendering of this decision, Judge BLODGETT ordered a re-argument of the question in a similar case, brought by the same Banks, to restrain the collection of the taxes for 1872, and adhered to his views as expressed in the above opinion, and allowed the injunctions in these cases

By stipulation of parties, one of these ten cases was taken by appeal direct to the Supreme Court of the United States, where it is now pending, the others to abide the event.

The Supreme Court of Pennsylvania held that the state Legislature has the power to tax the capital stock of National Banks; that the act of Congress of February 10th, 1868, only restricts the *rate* of taxation, and not the taxation itself; and also that such stock should be assessed for taxation at its current value in the market where the bank is located, and that the owner, not having appealed from the assessment, cannot insist that the tax was illegal because not based on the par value of the stock. *Everett* vs. *Louder, et al*, 5 *Chicago Legal News*, 195.

The Supreme Court has lately passed upon a case somewhat similar to the above, holding, in the "*State Tax on Foreign-held Bonds*," 15 Wallace, 300, that the power of state taxation is limited to persons, property and business within her jurisdiction; that bonds issued by a railroad company are property in the hands of the holders, and when held by non-residents of the state in which the company was organized, they are property beyond the jurisdiction of that state; that a state law requiring the treasurer of a company to retain a percentage of the interest on bonds held and payable outside of the state, was not a legitimate exercise of the taxing power, but under the pretense of levying a tax impaired the obligation of the contract between the parties; and that the tax laws of a state could have no extra-territorial operation, nor affect the rights of non-residents under contracts with citizens of the state. [*Reporter*.

THE ECLIPSE.

DISTRICT COURT—EASTERN DIVISION OF WISCONSIN—AUGUST TERM, 1871.

IN ADMIRALTY.

PURCHASE OF SUPPLIES IN FOREIGN STATE.

1. If the owner of a vessel orders necessary supplies in a port of another state, and the ship chandler charges them directly to the vessel, without any special arrangement for payment, he has a lien on the vessel therefor.

2. NOTE NOT A WAIVER OF LIEN.—A note taken for the amount of the supplies will not waive a maritime lien on a vessel unless so understood at the time. The note must, however, be returned or surrendered in court at the hearing.

3. The fact that the vessel is in a foreign port is *prima facie* evidence of a necessity for the credit of the vessel.

This was a libel by G. B. Dunham and J. P. Hoit, ship chandlers of Chicago, for supplies furnished this schooner. It was charged in the libel that the supplies were furnished on the credit of the vessel, the master and owner not having either money or credit to purchase them. This charge is denied in the answer, with the allegation that the owner of the vessel, William B. Selleck, was in good credit when the supplies were furnished and was able to pay for the same, and that libellants accepted his note for the amount, payable at a future day.

Selleck resided in Kenosha, in the state of Wisconsin, and the Eclipse was employed in the lumber trade, between ports in the state of Michigan, and Chicago, in the state of Illinois. Selleck also owned another schooner, named the Lewis Ludington, and had ordered the libellants to furnish such supplies for the schooners as might from time to time be called for by the masters. The account charged to the schooner Eclipse

commenced in April, 1870, running from time to time until the month of October of the same year. When Selleck made application for the supplies, he made no arrangement for their payment, nor were any inquiries made of him as to his pecuniary circumstances. The charges were made directly to the vessel. He purchased the Eclipse early in the year 1870, and he knew that she required new rigging to fit her for service that season. After the account had been running several months, libellants called Selleck's attention to it, and in August, 1870, he gave them his note for $1,136.85, the balance then due libellants, on bills for supplies to his two schooners and a small bill of his own of about $50. Further supplies were furnished to the Eclipse, and on December 14, 1870, Selleck took back his note, and paid $700, and gave libellants a new note, payable June 1, 1871, for $780.27, the amount remaining unpaid, and for which amount this libel was brought.

Further facts are stated in the opinion.

Finches, Lynde & Miller, for libellants.

Carys & Cottrill, for respondents.

MILLER, J.: It is contended by respondents' proctors that $97.31, balance of account against the Ludington is included in the last note, and that a receipt at the foot of said account, dated December 14, 1870, of payment by Selleck's note, payable June 1, 1871, is evidence of that fact.

The evidence is, that on December 14, 1870, the parties made a final accounting of all accounts, and in their presence the appropriation of the payment of $700 was made. And I am satisfied from the explanation given, that the account against the Ludington was paid out of that money. The receipt was open to explanation, and I think it may be fairly considered that the correct credits were made, leaving the balance against the Eclipse.

When Selleck gave the last note the libellants expressed their satisfaction of his pecuniary circumstances at that time. The

supplies were furnished for the schooner Eclipse and charged to her by name, without regard to the ability of Selleck, the owner.

There is no doubt, from the facts in evidence, that the supplies furnished were necessary for the vessel. And I am satisfied that they were furnished by the libellants on her credit. The owner resided in an adjoining state, some distance from Chicago. The schooner was as to the libellants a foreign vessel. There was no agreement between libellants and the owner, when the order was made for the supplies, or when they were being furnished, that the owner should be exclusively liable for payment. The order was given by the owner for supplies to the vessel, which were furnished and charged to the vessel, without further inquiry or agreement.

It is not pretended that the master had funds wherewith to pay libellants for the supplies. In the case of *The Kalorama*, 10 Wallace, 204, it is decided that it is no objection to the assertion of an admiralty lien against a vessel for necessary repairs and supplies to her in a foreign port, that the owner was there and gave directions in person for them, the same having been made expressly on the credit of the vessel.[1]

It is contended on the part of respondents that libellants waived their maritime lien on the vessel by accepting the note of the owner.

On the 14th of December, 1870, the parties made a final accounting, and the balance of the account against the Eclipse remaining unpaid was $780.27, for which the note was given by Selleck, payable on the first day of June, following. It is expressly testified by Dunham, one of the libellants, that the note was not accepted in payment of the account against the schooner. Selleck paid $700 in full of his small private account and of the Lewis Ludington account, and reduced the account of the Eclipse; and he stated that he could not pay more at that time, and gave the note. There is no evidence tending to con-

[1] *The Grapeshot*, 9 Wallace, 129; *The Guy*, Id., 758; *The Lulu*, 10 Id., 192.

tradict the testimony of Dunham, that the note was not accepted in satisfaction of the balance of the account against the Eclipse. Without such evidence it is fair to presume that libellants would not waive their maritime lien, by the acceptance of a promissory note payable nearly six months ahead. It is not to be presumed that a party would release a higher security upon acceptance of a less; taking a less security does not necessarily waive a higher.

From the non-payment and return of the first note, it may not be inferred that libellants consented to waive their maritime lien by accepting the last note or either of the notes. In the case of *Ramsay vs. Allegre*, 12 Wheaton, 611, it did not appear that the negotiable note of the respondent had been given up, or surrendered, at the hearing in the District Court, and for this reason the decree dismissing the libel was affirmed. This position is sanctioned in the opinion in the case of *Andrews vs. Wall*, 3 Howard, 568. And in the opinion in the *Steamer St. Lawrence*, 1 Black, on page 532, the Court remark: "Has this lien been forfeited or waived? It does not appear to have been forfeited or waived, under any provision in the New York statute, nor was it waived upon the principles of maritime law, by the acceptance of Graham's notes, unless the claimants can show that the libellants agreed to receive them in lieu of, and in place of, their original claim. The notes in this instance have been surrendered and were filed in the proceedings in the District Court. And the language of the Court in the case of *Ramsay vs. Allegre*, 12 Wheaton, 611, and of Judge Story in commenting upon that case in 3 Howard, 573, necessarily imply, that if the notes had been surrendered the party would have a right to stand upon his original contract, and to seek his remedy in the forum to which it originally belonged, as fully as if the notes had never been given." It also will appear from the statement in the case of *The Guy*, 9 Wallace, 758, that it should be made to appear by the claimant that the acceptances were taken in absolute payment. Nor does the pendency of an action at common law for necessary repairs or supplies

bar a libel in the admiralty.[1] In *Dike vs. The Propeller St. Joseph*, 6 McLean, 573, the libel claimed contribution from the vessel on a general average, for which bonds had been given. The court decided that though there may be a remedy at law, yet that does not take away the jurisdiction in admiralty. The maritime law in cases of material men, where it gives a tacit hypothecation or lien, gives the lien upon the vessel as an auxiliary to the personal security of the owner. It allows the party to give credit because it is for the general benefit of navigation and trade.[2]

In the case of *The Betsey and Rhoda*, Davcis, 112, a seaman accepted the promissory note of the owner for his wages; the note not being paid, he returned it and libeled the vessel; the court held that such a note will not be an extinguishment of the claim for wages, nor of the lien of the seaman against the ship, unless it is distinctly stated to him at the time that such will be the effect, and the note is accompanied by some additional security or advantage to the seaman as a compensation for his renouncing his lien on the vessel. Also in the case of *The Harriet*, 1 Sprague, 33, the libel was sustained after suit had been brought at law on a note accepted by a material man for supplies returned into court, it being held that the acceptance of the note did not extinguish the maritime lien.[3]

In *Moore & Foote vs. Newbury*, 6 McLean, 472, it is held that a note given by the owner for supplies to his vessel did not extinguish the lien. The same decision is made in the case of the *Schooner Active*, Olcott, 287. Also, in *Page vs. Hubbard*, 1 Sprague, 335, and in *Raymond vs. The Schooner Ellen Stewart*, 5 McLean, 269.

And in *Carter vs. Townsend*, 1 Clifford, 1, it is held that a lien for repairs and supplies furnished at Norfolk, Virginia, on a ship owned in Maine, is not lost by the creditor taking bills

[1] *The Custer*, 10 Wallace, 204–218.

[2] *The Brig Nestor*, 1 Sumner, 73–84; *The Bark Chusan*, 2 Story, 455.

[3] *Harris vs. The Kensington*, 8 Am. Law Register, 144.

of exchange on one of the owners, which bills were produced to be surrendered or cancelled.[1]

It seems to be well settled that the party claiming a maritime lien, must either return or offer to return the note or other security accepted by him, or bring it into court and surrender it to be cancelled, as is done in this case, before the lien will be enforced by decree in the admiralty.

In decreeing for libellants, this court follows its own decisions heretofore made in cases involving these questions.

A somewhat different rule is given in the case of *The Lady Franklin*, Volume 1 of this Series, p. 557; DAVIS, J., following the rule in *Pratt vs. Reed*, 19 Howard, 359.

Where there is no real or apparent necessity for pledging the credit of a vessel, there is no lien for supplies furnished. The 12th rule of admiralty was only intended to regulate practice, and the question of the liability of the ship, freight, master or owner does not depend upon it, but upon general admiralty and maritime law. *The Eledona*, 2 Benedict, 31.

The fact that a vessel which is repaired or supplied is not in her home port, makes, in the absence of other circumstances, a case of apparent necessity for the credit of the vessel. This, however, may be dispelled by proof. *The Washington Irving*, Id., 318.

An admission in the pleadings that the vessel was in a foreign port is an admission of apparent necessity for the credit of the vessel, and unless special facts are set up, the only question on the pleadings is whether the supplies were furnished. *Ib.*

If neither master nor owners are known to have credit at a foreign port, the presumption is that credit was given to the vessel, and a lien is created. No express pledge, intention or declaration is necessary, and money advanced to discharge other advances or liabilities may become a lien. *The Emily B. Souder*, 8 Blatchford, 337; *The A. R. Dunlap*, Lowell, 350. And in a foreign port it is not necessary to show that the owner was without credit. *The James Guy*, 1 Benedict, 112.

For numerous authorities on the questions of maritime liens, in their different phases, consult *The Celestine*, Volume 1 of this Series, p. 1; *The Maitland*, 2 do., 201. [*Reporter.*

[1] See also *Baker vs. Draper*, 1 Clifford, 490.

NUGENT vs. PUTNAM COUNTY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—AUGUST, 1871.

COUNTY RAILROAD AID BONDS.

1. INVALID IF ISSUED TO CONSOLIDATED AND NOT ORIGINAL COMPANY.—County bonds issued to a consolidated railroad company upon a subscription by the county to one of the roads, previous to the consolidation, are illegal and invalid.

2. After the consolidation of the road to aid which the vote was taken, the Supervisors had no authority to issue the bonds.

3. NOT SAVED BY BEING MADE PAYABLE TO ORIGINAL COMPANY.—The validity of the bonds is not preserved by making them in terms payable to the original company. That corporation being dissolved, the legal effect is the same as if they were drawn payable to bearer.

4. NOR IF CONSOLIDATION BY CHARTER.—Nor does a provision in the charter of the company allowing them to consolidate change the rule.

5. NOR BY FALSE RECITALS.—Though the bonds state on their face that they are issued in pursuance of law, that assertion being untrue, cannot clothe the authorities with power to make the issue.

This was an action of assumpsit by George Nugent on ninety coupons issued by the county of Putnam for the interest on certain bonds issued by said county. The defendant denied the validity of the bonds and coupons; to which the plaintiff replied, setting up the following facts by which he claimed that the validity of the bonds was fully established, and also that the defendant was estopped from denying the validity of the bonds.

On and prior to the 4th of June, 1869, a corporation existed in this state under a special charter known by the corporate name of "The Kankakee and Illinois River Railroad Company," with authority to construct and maintain a railroad from the eastern line of this state, by way of Momence, Kankakee, Dwight, and Streator, to Bureau Junction, in Bureau

county, with a capital of one hundred thousand dollars, subject to be increased to such an amount as should be necessary to complete the road of the company. On the 4th day of June, 1869, the Board of Supervisors of the county of Putnam, through which the proposed line was to pass, ordered an election, to be held July 10th, at the usual place for elections in said county, to determine whether said county should subscribe for seventy-five thousand dollars of the stock of said company, conditioned that said stock should be paid for in the bonds of said county, bearing interest at ten per cent. per annum, payable annually, provided said road should be located and constructed through or within one-half mile of the corporate limits of the town of Hennepin, in said county.

The election was held, resulting in favor of said subscription; and on the 4th of January, 1870, another election was called by said board, to be held on the 8th day of February, 1870, to determine whether said county would subscribe for twenty-five thousand dollars additional stock of said railroad company, payable in the bonds of said county, on the condition that said railroad should be located within one-half mile of the corporate limits of the town of Hennepin, these bonds to bear interest at ten per cent. per annum.

This election was held, and resulted in favor of said proposition.

After said election, on the 10th day of July, 1870, the said Board of Supervisors adopted a resolution stating that said subscription of seventy-five thousand dollars "is hereby made in pursuance of said election, subject to the following conditions: That a committee of five persons be hereafter appointed by this board, whose duty it shall be to direct the issue of said bonds and protect the interests of said county, and discharge such other duty as shall be devolved upon them by said board, and the bonds of said county shall be issued on said subscription in sums of not less than five hundred dollars, payable in annual installments of not less than ten thousand dollars, five years after the date of issue, bearing interest at the rate of ten

per cent. per annum, payable annually, and that the Clerk of the County Court should issue to said railroad company the said bonds, but providing that the bonds should not be issued until a *bona fide* contract was made with responsible parties for all the iron necessary to the construction of the road, and that said bonds issued to said company upon the orders of said board shall be applied to the construction of said railroad in and through said county of Putnam, as specified in a previous order of this board."

On the 15th of March, 1870, said board passed a resolution resolving that said subscription of twenty-five thousand dollars is hereby made in pursuance of said resolution of the 8th of February, subject to the following conditions, (being substantially the same as were attached to the seventy-five thousand dollar issue.) But no subscription was in fact ever made to the stock of said company by or on behalf of said county.

On and prior to the 21st of October, 1870, there existed in the state of Indiana a corporation known as "The Plymouth, Kankakee and Pacific Railroad Company," with power to construct and maintain a railroad from the easterly line of this state to Plymouth, Indiana. On the 21st of October, 1870, the corporate rights, stock, powers and franchises of the Kankakee and Illinois River Railroad Company were consolidated with the stock, corporate rights and franchises of the Plymouth, Kankakee and Pacific Railroad Company, and they became a consolidated company known as the Plymouth, Kankakee and Pacific Railroad Company, with a capital stock of two millions five hundred thousand dollars, it being provided by the articles of consolidation that the stockholders of the original companies should be stockholders of the consolidated company. To this consolidation the supervisors of the county of Putnam assented, and issued to said consolidated company the bonds of the county for said stock so voted to said Kankakee and Illinois Railroad Company, bearing interest and payable as provided in said resolution, with coupons attached for annual interest accruing thereon, which are the coupons in

controversy, said bonds being made payable in terms to the Kankakee and Illinois River Railroad Company, but actually dated, issued and delivered after said Kankakee and Illinois River Railroad Company had become consolidated with the Plymouth, Kankakee and Pacific Railroad Company, and after the election which sanctioned the subscription to the stock of said Kankakee and Illinois River Railroad Company.

The Board of Supervisors appointed a committee who delivered the bonds to said railroad, and said committee, before issuing the bonds, certified to said Board of Supervisors that said railroad company had in all respects performed all the conditions required of it, and was entitled to receive said bonds.

In the fall of 1871 said Board of Supervisors levied a tax on all the taxable property of said county to raise the money for paying the interest on said bonds, and also borrowed the money to pay a portion of the interest which had accrued thereon. The plaintiff was a holder of said bonds for value. The said bonds state upon their face that they were "*issued for the subscription to the stock of the Kankakee and Illinois River Railroad Company, in pursuance of a resolution of the Board of Supervisors of said county.*"

Demurrer by defendant to replication.

T. M. Shaw, for plaintiff.

T. Lyle Dickey, for defendant.

BLODGETT, J.: Upon these facts the question arises as to the liability of the county of Putnam upon the bonds and coupons in question; or, to more specifically state the issue as made by the pleadings, "Is the county, by what it has done, estopped from denying its liability upon these bonds and coupons?"

I have very carefully examined the question thus raised by these pleadings, and feel compelled to say that I cannot find any line of distinction between this case and *Marsh vs. Fulton County*, 10 Wallace, 676, and it seems to me that case must control the decision of the court in this.

The material facts in that case are these: The state had chartered the Mississippi and Wabash Railroad Company, with power to construct a railroad across the state through Fulton county. In November, 1853, the question was submitted to the voters of the county whether the county should subscribe seventy-five thousand dollars to the stock of said company, payable in bonds of said county, such bonds not to be issued until the secretary of the company should certify to the board that seven hundred thousand dollars had been subscribed and that five per cent. had been paid thereon. A majority of the votes of the county were cast in favor of the subscription, and in April, 1854, the board ordered its clerk to subscribe for seventy-five thousand dollars of the stock, and issue bonds when it should be certified to him by the secretary of the company that seven hundred thousand dollars of the stock had been subscribed and five per cent. had been paid thereon. In February, 1857, an act was passed by the Legislature of Illinois amending the charter of the Mississippi and Wabash Railroad, by which the line of the road was divided into three divisions, and each division was placed under the management and control of a board of three commissioners, to be elected by the stockholders of each division, to be invested with all the powers of the directors of the road in their division. In April, 1857, the stockholders of the central division elected commissioners of that division, who thenceforth, until December, 1868, exercised all the powers conferred by this act.

On the books of the central division thus organized, the clerk of the County Court of Fulton county—said county being in said division—acting as the clerk of the Board of Supervisors, made a subscription of seventy-five thousand dollars in the name of the county. In September following he issued to this division the bonds which were in suit in that cause. On these facts the court says:

"The amendatory act of 1857, dividing the road into three divisions, and subjecting each division to the control and management of a different board, clothed with all the powers

of the original board, so far as the division was concerned, worked a fundamental change in the character of the original corporation, and created three distinct corporations in its place. A subscription to a company whose charter provided for a continuous line of railroad of two hundred and thirty miles, across the entire state, was voted by the electors of Fulton county; not a subscription to a company whose line of road was less than sixty miles in extent, and which, disconnected from the other portions of the original line, would be of comparatively little value.

"But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact, we do not perceive how it could affect the liability of the county of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instrument might for such reason be taken without special inquiry into their validity. It is a case where the power to contract never existed; where the instruments might, with equal authority, have been issued by any other citizen of the county. *It is a case, too, where the holder was bound to look to the action of the officers of the county, and ascertain whether the law had been so far followed by them as to justify the issue of the bonds.* The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder.

"It is also contended that if the bonds in suit were issued without authority, their issue was subsequently ratified, and various acts of the supervisors of the county are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification even by the supervisors. But the answer to them all is, that the power of ratification did not lie with the supervisors. A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a rati-

fication can only be made when the party ratifying possesses the power to perform the act ratified."

"The supervisors possessed no authority to make the subscription or issue the bonds in the first instance, without the previous sanction of the qualified voters of the county. The supervisors, in that particular, were the mere agents of the county. They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription, in the first instance, without such authorization. It would be absurd to say that they could, without such vote, by simple expressions of approval or in some other indirect way, give validity to acts, when they were directly in terms prohibited by statute from doing those acts, until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition."

I have quoted these copious extracts from this decision because it seems to me to contain the controlling principle of the case at bar. The votes of the 10th of July, 1869, and the 8th of February, 1870, were both upon the proposition to subscribe to the capital stock of the Kankakee and Illinois River Railroad Company, a corporation possessing the power to construct and maintain a line of road between certain termini in this state, with a capital stock limited in any event to the cost of constructing the road.

The bonds in question were issued after this Kankakee and Illinois River Railroad Company had merged itself by articles of consolidation into another corporation now known as the Plymouth, Kankakee and Pacific Railroad Company, a corporation having control of a different enterprise from that of the original company, possessing a different capital stock, and governed by a different Board of Directors, elected upon a different basis, with different termini to the road.

In the case of *Clearwater vs. Meredith*, in the 1st Wallace,

25, the Supreme Court of the United States has passed upon the effect of consolidating railroad corporations.

In this case Meredith had guaranteed to Clearwater that certain railroad stock should be worth par on the 1st of October, 1855; suit was brought upon the guarantee, and assigned for breach that the stock was not worth par at the time stipulated. To this the defendant pleaded that the stock of the said company had been merged and consolidated with the stock of another railroad company, making one stock of the two under a new corporate name, and that the consolidation was made with the consent of the stockholders of both companies. Upon these facts the Supreme Court, by Mr. Justice DAVIS, says: "When any person takes stock in a railroad corporation he has entered into a contract with the company that his interests shall be subject to the direction and control of the proper authorities of the corporation, to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribed should be changed in its purposes and character, at the will and pleasure of a majority of the stockholders, so that new responsibilities, and it may be, new hazards are added to the original undertaking. He may be very willing to embark in one enterprise and unwilling to engage in another; to assist in building a short line railway and adverse to risking his money in one having a longer line of transit.

"But it is not every unimportant change which would work a dissolution of the contract. It must be such a change that a new and different business is superadded to the original undertaking.

"The act of the Legislature of Indiana, allowing corporations to merge and consolidate their stock, was an enabling act—was permissive, not mandatory. It simply gave the consent of the Legislature to whatever could lawfully be done, and which, without that consent, could not be done at all. By virtue of this act, the consolidations in the plea stated were made. Clearwater, *before* the consolidation, was a stockholder

in one corporation, created for a given purpose; after it he was a stockholder in another and different corporation, with other privileges, powers, franchises, and stockholders. The effect of the consolidation 'was a dissolution of the three corporations, and at the same instant, the creation of a new corporation, with property, liabilities, and stockholders, derived from those passing out of existence.'[1] And the act of consolidation was not void, because the state assented to it; but a non-consenting stockholder was discharged."

It is not necessary to quote more than this, for the principle which I alluded to is clearly announced, namely, that a different corporation results from the consolidation. The consolidated company is not either of the original corporations, although it may take the name of one of them. The original corporation for the stock of which the county of Putnam subscribed, was solely under the control of the state of Illinois; its franchises had been created by that state, and were under its control. The consolidated company is in two states; its affairs are subject to the control of the Legislatures of two states.

The same principle was announced in the case of *McMahon vs. Morrison*, in the 16th of Indiana, and has also been fully set forth in 29 Illinois, 242.

Now, the principle of all these authorities which I have quoted, it seems to me, is that the corporate existence of the Kankakee and Illinois River Railroad Company ceased on the 21st of October, 1871, and from that time forward whatever franchises it had were merged in the Plymouth, Kankakee and Pacific Railroad Company, the consolidated corporation, and after this event had taken place, after what we may call the legal demise of the Kankakee and Illinois River Railroad Company, the Board of Supervisors of Putnam county authorized the issue to the consolidated corporation of the bonds in question.

I cannot see any feature in this case which differs from

[1] *McMahon vs. Morrison*, 16 Indiana, 172.

Marsh vs. Fulton County, unless that this is a stronger case than that. There the corporation existed in and was controlled by this state alone, and its termini remained the same, while this consolidated corporation is a very different enterprise from the original to which the subscription was authorized.

It was insisted in the argument, and also in the pleadings, that the fact that these bonds were made payable in terms to the Kankakee and Illinois River Railroad Company should control the decision of the court. It certainly is an important fact, and has received consideration, but I cannot see that it changes the legal bearings of the question. This was a defunct corporation, and the bonds might just as well have been made payable to *bearer*, and the person to whom they are made payable cuts no figure in the case.

The Kankakee and Illinois River Railroad Company had gone out of existence, and its demise had become a matter of public notoriety—a matter of public record, because it was necessary that the articles of consolidation should be filed in the office of the Secretary of State.

It is urged further that this company having the power originally by its charter to consolidate with another company, makes the rule in *Clearwater vs. Meredith* inapplicable in this case; but I cannot look upon this clause as changing the application, because since February, 1854,[1] there has been upon the statute books of this state a general law authorizing any two railroad corporations whose lines form a continuous route, to consolidate their stock, franchises and property into one corporation, and in examining the proceedings by which this consolidation was accomplished, it is clear that this consolidation was made under this general law, and not under the charter of the company.

Now, in the case of *Clearwater vs. Meredith*, the general law of the state of Indiana existed at the time the stock in question was issued. The law of that state and of Illinois

[1] Act of February 28, 1854, Gross' Statutes, 1872, p. 537.

is substantially the same, the two states having kept pace with each other in their legislation on this question; but the Supreme Court did not hold that the organic right of either or both corporations to consolidate changed the rights of the stockholders.

Following the doctrine laid down in *Marsh vs. Fulton County*, I am of opinion these bonds are illegal and void. They were issued by the Board of Supervisors without the power being granted to them for that purpose. The vote of the people authorized the county to issue its bonds to the Kankakee and Illinois River Railroad Company, and they were in fact issued to another company without a vote. It is true that they bear on their face the statement that they were issued in pursuance of law, and for the stock of the Kankakee and Illinois River Railroad Company, but the assertion is untrue and cannot he held to clothe the county authorities with power to make the issue.

Demurrer sustained.

For a full discussion of various questions arising under municipal bonds consult the following cases previously reported in this Series, and numerous authorities there cited: *Mygatt vs. City of Green Bay*, Volume 1, 292; *Luling vs. City of Racine*, Id. 314; *Schenck vs. Supervisors of Marshall County*, Id. 533; *Goedgen vs. Supervisors of Manitowoc County*, 2 do. 328.

The duty of Board of Supervisors to follow strictly the law, and their powers construed, *Harding vs. Rockford, Rock Island and St. Louis R. R. Co.*, Supreme Court of Illinois, May, 1873, reported in 5 Chicago Legal News, 424. [*Reporter*

In re COOK AND GLEASON.

DISTRICT COURT, WESTERN DISTRICT OF WISCONSIN.—SEPTEMBER, 1871.

MECHANIC'S LIEN UNDER STATE LAW.

1. WHEN ATTACHES.—The lien created by the statute of Wisconsin attaches from the time the building was commenced, or the materials furnished.

2. PETITION FILED BY LEAVE.—A person claiming a lien should not proceed in the State Courts after petition in bankruptcy filed, without leave of this Court. The doing so is a contempt, and until discontinuance of such suits the claimants will not be protected by this Court.

3. BANKRUPT LAW RECOGNIZES LIENS.—The Bankrupt Act provides for the protection of legal liens against the bankrupt's estate, instead of destroying them, and where a party has a lien when the petition in bankruptcy is filed, the court in bankruptcy will adjudicate upon and protect it.

4. HOW FAR GOOD.—The lien is only good for the articles actually used in the building, or sold for such use.

5. On a contract not completed when petition was filed a *pro rata* allowance only should be made.

6. Parties having commenced suits in the state courts without such consent must discontinue them before they can be paid by the bankruptcy court.

7. NOT FOR WORK DUE AFTER PETITION FILED.—For work done afterwards nothing should be allowed. Parties cannot thus create a lien upon property in the possession of the court.

This was an application by divers mechanics and others who claimed liens for their work upon and materials used in a certain store lately erected by the bankrupts, for which they had not been paid at the commencement of proceedings in bankruptcy.

They went on and finished, or claimed to finish the building after the proceedings in bankruptcy were commenced. They then filed their petitions, in conformity with the state law, to perfect their liens, and commenced suits against the bank-

rupts and the assignee in bankruptcy, to enforce them in the state courts. This court, upon the application of the assignee, stayed such suits, and directed the property to be sold free of all liens of that character, and that the proceeds be paid into court, and ordered that all such liens be transferred to that fund in the registry of the court.

The mechanics and others, after such sale, filed proof of their claims in this court, and now ask to be paid the amount thereof, with their costs in the suits prosecuted in the state courts to enforce the same.

The material sections of the Wisconsin Mechanics' Lien Laws, are as follows:

§ 1, chap. 153, Taylor's Statutes, p. 1761, "Every dwelling house or other building hereafter constructed, repaired or removed, * * together with the right, title and interest of the person or persons owning such dwelling house, etc., in and to the lands upon which the same shall be situated * * shall be subject to the payment of all debts contracted for, or by reason of any work done or any material found or provided by any bricklayer, stonecutter, mason, etc., or any other person employed in erecting or furnishing materials in the erection, construction, protection or repairing or removing of such dwelling house, etc., before any other lien which originated subsequent to the commencement of such house, building, or repairs or removal."

§ 6, Taylor's Statutes, p. 1764, § 1, chap. 59, Laws of 1858, "No such debt for work and materials shall remain a lien upon such lands, etc., longer than one year from the time of furnishing of materials, or the performance of the labor, unless a petition or claim for the same be filed, and an action for the recovery thereof be instituted, within the same year. Such petition or claim shall be filed in the office of the circuit court of the proper county, within six months from the date of the last charge for work and labor performed, or materials furnished."

§ 9. Taylor's Statutes, § 4, chap. 113, Laws of 1859. "In all cases of lien granted by the provisions of chapter 153, of the Revised Statutes, where right of action has at the time of the passage of this act, accrued, and action has not been commenced, the person or persons claiming the benefit of such lien, shall, before being entitled to maintain an action for the same, and within sixty days after this act shall take effect, file the petition or claim as provided by § 1 of this act."

W. P. Bartlett and *A. Meggett*, for lien claimants.

Tenney, McClellan & Tenney, for assignees.

HOPKINS, J.: I think the lien created by chapter 153 of the Revised Statutes of the state of Wisconsin, entitled, "Of the lien of mechanics," Taylor's Stat., p. 1761, attaches from the time the building was commenced, upon which the work was done or material used. Sections 1 and 4 taken together are so clear upon that point that there seems little room for difference of opinion. The case, *Dobbs vs. Enearl*, 4 Wisconsin, 451, cited by counsel for assignee as establishing a contrary doctrine has, I think, been substantially overruled by the cases of *Witte vs. Meyer*, 11 Wisconsin, 295, and of *Jessup et al. vs. Stone et al.*, 13 Wisconsin, 466; at all events as it has not been followed by the court which pronounced it, and as it is so widely different from my understanding of the statute I do not feel disposed to follow it unless I am bound to, as the construction given to a state statute by the highest tribunal of the state. And as later decisions of the same court are at variance with it, I cannot regard it as the law of the state, but shall adopt the views expressed in the later decisions above referred to, which sustain the interpretation given by me to the statute as to the time the lien attaches.

I therefore think that any mechanic who had a lien at the filing of the petition in bankruptcy would have a right, by leave of this court, to file a petition according to the provisions of section 4 of the act of 1859, so as to continue it, notwithstanding the commencement or pendency of bankruptcy proceedings.

The bankrupt act provides for the protection of legal liens against the bankrupt's property, instead of destroying them; I hold, therefore, that where a party has a lien when the petition in bankruptcy is filed, but according to the requirements of the statute, in order to continue it beyond a certain period, it is necessary to file a petition in the clerk's office, such party having first obtained the leave of this court, has the right to file such petition, and thereby continue the lien thereon, or if he does not file his petition in the clerk's office, but asks to have his rights established in this court, that the court should

hold that as against property in the hands of an assignee in bankruptcy it should not be necessary to file a petition in the state court to continue it.[1]

Since the commencement of proceedings in bankruptcy and the appointment of the assignees, several parties have commenced suits against bankrupts and assignees to enforce their liens in the state circuit court. These suits were improperly brought. The liens of mechanics and all others should be presented to and be ascertained by this court, and the parties claiming those liens have no right to bring such suits in the state court without first obtaining leave of this court to do so.[2] I therefore disallow the costs of all those cases, and direct the assignee or clerk to pay only the amount of the lien in such case.

If a party has a claim, lien or interest in the property in the hands of an assignee in bankruptcy, he should apply to this court for relief, and this court may grant the relief or allow a suit to be brought either in this or the state courts to determine the same; but without such consent I think parties have no right to sue, and are guilty of a contempt of the authority of the court in so doing. This principle is applicable to every interference with the possession of a receiver, sequestrator, committee or custodian who holds property as the officer of the court, as his possession is in law the possession of the court itself.[3]

Those parties who have commenced such suits must discontinue them before they can be paid by this court the amount of their claims.

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[1] *In re Coulter*, 5 Bankruptcy Register, 64; 3 *Chicago Legal News*, 377; see opinion of Supreme Court of Massachusetts, *in re Clifton vs. Foster*, 3 Bankruptcy Register, 162.

[2] *Angel vs. Smith*, 9 Vesey, Jr., 335; *in re* Heller, 3 Paige, 199; *in re Hopper*, 5 Paige, 489; *Wiswall vs. Sampson*, 14 Howard, 52.

[3] Edwards on Receivers, 129; *in re Heller*, 3 Paige, 199; *Kaye vs. Cunningham*, 5 Maddock, 406; *in re Hopper*, 5 Paige, 489; *Taylor vs. Carryl*, 20 Howard, 583.

This Court acquired jurisdiction over the property and the bankrupts and had taken possession of the property. It will, therefore, insist upon its right to administer and distribute the property. Parties should understand that they have no right to commence suits against assignees in bankruptcy to effect the property, for as they are accountable to this court for the property, it is the duty of the court to protect them in the possession. The Federal courts sedulously avoid all interference with property held by the state courts or their officers, and they with equal solicitude and firmness maintain their right to hold property which is in their possession, or in the custody of their officers, against the process of any state court, and will not permit persons through process issuing from state courts to interfere with impunity with property so in possession of the Federal courts, or their officers; and this principle has in the United States Supreme Court, as stated in *Taylor vs. Carryl*, 20 Howard, 595, received its clearest illustrations, and it has been employed most frequently in that court, and with most benign results.

And as stated in that opinion, "It forms a recognized portion of the duty of this court to give preference to such principles and methods of procedure as shall seem to conciliate the distinct and independent tribunals of the states and of the Union, so that they may co-operate as harmonious members of a judicial system, co-extensive with the United States and submitting to the paramount authority of the same Constitution, laws and federal obligations."

Upon filing discontinuance of the suits pending in the state courts for the enforcement of such liens, the clerk will pay out of the funds in court due from such sale, the amount of liens hereby allowed. In Bosworth & Son's case, the issue is as to whether the materials were furnished and used for this store. The only proof is that of Mr. Gleason, who says only $396.90 of those charged were actually used in the building; the balance was used by another firm, who were building adjoining to them. I shall only, therefore, allow that sum.

When the material is not in fact used by the party in the building sought to be charged, the seller must show that they were sold to be so used,[1] which he failed to do in this case.

In the case of Sanborn & Butterfield, for work, they claim $91.81, but Mr. Gleason testified that they had not finished their contract and that it would be worth $25 to finish it; so I deduct from the claim $25, and allow it at $66.81 and interest.

It appears from the bill of particulars annexed to Bangs & Fish's proof that $147.51 of the amount of the claim was for work done after filing the petition in bankruptcy. This part of the claim is not allowable. Mechanics should have stopped then, and if they went on they certainly cannot create a lien upon the property when in the possession of the court. Their claim is allowed at $393.64, and interest at seven per cent. since January 1, 1871.

That a creditor claiming a lien must proceed in the bankrupt court, or obtain leave from that court, consult *Smith, assignee, etc., vs. Kehr*, 7 Bankruptcy Register, 97; *In re Ulrich et al.*, 8 do., 15.

For construction of the mechanic's lien law in other states, on similar questions, consult *In re Dey*, 3 Bankruptcy Register, 81; *In re Gregg*, do., 131. [*Reporter.*

[1] *Esslinger vs. Huebner*, 22 Wisconsin, 633.

In re COOK AND GLEASON.

DISTRICT COURT—WESTERN DISTRICT OF WISCONSIN—SEPTEMBER TERM, 1871.

IN BANKRUPTCY.

1. INSOLVENT PARTNERS—TRUSTEES FOR FIRM CREDITORS.—When partners are in fact insolvent, they should be considered in equity as holding the partnership effects in trust for the benefit of the firm creditors, and cannot by a transfer of the interest of one to the other defeat this trust.

2. TRANSFER TO CO-PARTNER.—A sale by one partner to his co-partner, when the firm is insolvent and on the eve of bankruptcy, is presumptively fraudulent as to the firm creditors, and the court should set it aside and distribute the property as firm property.

3. WHEN VOID.—The legal effect of such transfer being to change the order of payment and prefer certain creditors, the private creditors over the firm creditors, it would be void as creating a preference contrary to the provisions of section 35 of the Bankrupt Law.

This was a petition by Clara M. Davis, to obtain satisfaction, out of funds in the hands of the assignee, of a judgment recovered by her against Charles R. Gleason, one of the bankrupts.

The facts appear fully in the opinion.

W. P. Bartlett, for petitioner.

Tenney, McClellan & Tenney, for assignee, and firm creditors.

HOPKINS, J.: The questions raised in this case are of far more than ordinary importance to the whole mercantile community. The bankrupts entered into a mercantile and lumbering partnership in the year 1868, Cook agreeing to put in one-third of the capital, and Gleason two-thirds. Cook, it is claimed, did not put in his share, and what he did put in he drew out, princi-

pally before the 1st of January, 1871. The firm, in December, 1870, were threatened with bankruptcy proceedings, and were largely insolvent. About the first of January, 1871, the firm dissolved, and Cook agreed to transfer all his interest in the firm to Gleason for five hundred dollars, which he was to receive in claims, $300 being against himself, and Gleason agreeing to pay the partnership debts; but this transfer was not in fact made until the 18th day of January, 1871, when the papers were executed and notice of the dissolution published. During the year 1870, the parties, with the joint funds, built a store for their partnership business on a lot they owned in Eau Claire.

That store and lot, at the time of the dissolution, was a part of the assets of the firm, and was transferred to Gleason by Cook as a part of the firm property. The firm was then insolvent, and so were the partners individually; but as to whether they, or either of them knew it, the evidence is insufficient to determine, although the probabilities are that they did, for Cook had withdrawn and used up all his capital, and they were being strongly pressed by their creditors, and even threatened with bankruptcy proceedings.

The debts were principally firm debts, and there is no evidence before me that either owed any individual debts, except the debt of the petitioner against Gleason. One of the firm creditors filed a petition in bankruptcy on the 19th day of January, 1871, the day after the execution of the transfer papers from Cook to Gleason, and upon this petition they were adjudged bankrupts.

This store was taken possession of by the assignee in bankruptcy, and was sold by order of the court, free and clear of all incumbrances, except a certain mortgage, and the money ordered brought into court, and the claims of all creditors which were a legal lien upon the property to stand as against the fund arising from the sale.

Clara M. Davis now petitions the court for the payment of a judgment which she obtained against the bankrupt, Charles

R. Gleason, on the 22d day of January, 1870, for $1,562.97, and interest since its recovery, out of the fund derived from such sale. In her behalf it is argued that by the transfer of Cook to Gleason the property that before was partnership property and subject first to the payment of the partnership debts, became the private property of Gleason, and that thereupon her judgment became a lien upon that real estate, and should be paid before the partnership debts; that at the time of filing the petition in bankruptcy there was no partnership property, but it had, by the dissolution of the firm and the transfer by Cook to Gleason, become the individual property of Gleason. It was further argued that, by the transfer, what was before partnership property had become private property, and was, under the provision of section 36 of the bankrupt act, to be applied first to the payment of the private debts of Gleason, and only the surplus remaining after the payment in full of all Gleason's private debts was applicable to the payment of the partnership debts of Cook & Gleason.

If it did become private property by that transfer, such is undoubtedly the rule of law. The bankrupt act, under which the assignee took and sold it, provides that the net proceeds of all the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors, and the balance only of the separate estate, after payment of the separate debts, is to be applied to the payment of the joint debts; and the balance only of the partnership property, after the payment of all partnership debts, to be applied to the payment of the separate debts. In *Howe vs. Lawrence*, 9 Cushing, 553, it is said the effect of such transfer, as between the partners, is to vest the legal title to the property in the individual partner with a right to use and dispose of it as his separate property. The court say further that it would seem to follow as a necessary consequence that the creditors of the firm, after such conveyance, would have no right to look

to the property transferred as joint property upon which they had any special claim or lien.

This, they say, is the effect when the property is sold in good faith and without any intent to defraud the creditors of the firm. In that case they hold, however, that, although the partnership was insolvent, the sale was good to place the legal title in the individual partner, and to give the individual creditors of the buying partner a preference over the partnership creditors. They say, however, that there was no proof to show that the partners knew they were insolvent. It was claimed, on the argument, that the case went so far as to hold that knowledge, even of their insolvency, would not change the rule; but I don't think the decision goes so far. That case lays down the rule correctly as applicable to solvent partnership, I have no doubt; *Ladd vs. Griswold*, 4 Gilman, 25; but, in cases where the firm is insolvent, I am not satisfied with the reasoning or conclusions, and I think I am sustained in my view by the case of *Ketchum vs. Durkee*, 1 Barbour's Chancery R., 480, and Story on Partnership, Sec. 358, *et seq.*

I think where a firm is insolvent the partners should be considered rather in the light of trustees of the firm property for the benefit of the firm creditors, and should not be allowed to sell to each other, and thus defeat the equitable priority of the firm creditors.

But if such transfer operates to make what was previously company property, private property and applicable, first to the payment of the private debts of the partner purchasing, as would be the necessary result in cases of insolvency and bankruptcy such transfer would be a fraud upon the joint creditors, it would be sanctioning the right of one partner to allow his share of the firm property to be applied to the payment of a debt for which neither he nor his property was liable at law or in equity.[1] In other words, it would be authorizing the partner selling to assign his property to pay

[1] *Kirby vs. Schoonmaker*, 3 Barbour's Chancery R. 46.

the debts of another, for which he was in no way liable, instead of paying his own debts. He would receive no legal consideration in such case, and such conveyance would be in fraud of the law, and equity would at once set it aside. It is only when parties act fairly for the purpose of dissolution and winding up the affairs of the firm that creditors will be bound by a change of the partnership property to the separate estate of one of the partners. *Howe et al. vs. Lawrence et al.*, supra, 558; Story on Partnership, section 97, note 2. Take this case as an illustration. Before the sale this was partnership property and liable, in case of bankruptcy, first to the payment of all firm debts. Cook sells his share to Gleason in consideration of a nominal sum and the agreement that Gleason would pay the firm debts. Gleason does not pay, and the next day after the transfer and notice proceedings in bankruptcy are commenced, and the property, instead of being applied to the payment of Cook's debts, or the firm's debts for which he was liable, is applied first to the payment of debts for which he is in no way liable. Can it be possible that such a transaction, causing such injustice towards the firm creditors, can be sustained? If he had assigned his interest in the firm assets to pay Gleason's private debts, instead of his own or the firm debts, would not the court have set it aside as being without consideration, and a fraud upon his own creditors? And such being the legal consequences of the transfer as claimed by the counsel of Davis, can there be any other or different decision in this case than there would be in that? It seems to me not. The transaction in its legal effect, is the same, and courts must pronounce the same judgment upon it as if the transfer had expressed that purpose upon its face. To sustain this transaction, and give to it the effect claimed by Davis's counsel, would be to sanction, in the most direct manner, the right of insolvent partners to create preferences contrary to the express terms of the bankrupt act.[1] I find this question has indirectly been before

[1] *In re Byrne* 1 Bankrupt Register, 12; *In re Crockett et al.*, 2 do. 75.

some of the district courts in bankruptcy, and although not directly passed upon, I think the reasoning in those cases in harmony with the views herein expressed by me.

I think there are three good answers to the claim of Davis, the private creditor of Gleason:

First—When partners, as in this case, are in fact insolvent, they should be considered in equity as holding the partnership effects in trust for the benefit of the firm creditors; and they cannot, by a transfer of the interest of one to the other, defeat this trust; as stated in *Bird vs. Morrison*, 12 Wisconsin, 153: "The partnership property is subject to an implied trust in favor of the partnership debts."

Second—That a sale by one partner to his co-partner, when the firm is insolvent and upon the eve of bankruptcy, as in this case, which, if upheld, would operate to apply the property of the retiring partner to the payment of the individual debts of the partner purchasing, is presumptively fraudulent as to the firm creditors, and the courts should set aside such sale, and distribute the property as firm property to the payment of the firm debts.

Third—If the legal effect of such transfer would be to change the order of payment and prefer certain creditors, the private creditors over the firm creditors, it would be void as creating a preference contrary to the provisions of section 35, of the bankrupt act.

I therefore order and adjudge that the sale of Cook to Gleason was fraudulent and void as to firm creditors, and direct that the partnership property and assets of the firm of Cook & Gleason be distributed as partnership effects and to the payment of the firm debts as provided by law.

I further order and adjudge that the store and lot, for the purpose of distribution, are to be treated as a part of the firm assets, and that the judgment of the petitioner was not and did not becoms a lien thereon by the sale of Cook to Gleason, and that the petitioner Davis has no lien or claim upon said fund by virtue thereof, and that her judgment is not payable out

of the firm effects of Cook & Gleason until after the payment of all the debts of said firm.

And the petition and motion of said Davis is denied.

Consult *In re Munn*, *post*, 442; *In re Knight*, Vol. 2 of this Series, 515. [*Reporter.*

JENKINS, Assignee, Etc., vs. EINSTEIN.

Circuit Court—Northern District of Illinois—July Term, 1871.

In Equity.

FRAUDULENT CONVEYANCE.

1. Intent of both Parties must Appear.—To set aside a conveyance as made to hinder and defraud creditors the intention of both parties must be shown,

2. Testimony of witnesses as to the value of property at an anterior date commented upon.

3. Inadequacy of Consideration Must be Gross.—To set aside a conveyance for inadequacy of consideration, the consideration must be *grossly* inadequate, and such as to clearly indicate the existence of unfair dealing, fraud, imposition or oppression.

4. Purchase without Abstract of Title.—The fact that an attorney, who thinks that he knows the title, has confidence in the vendor, and purchases without an abstract or examination of title, is not a proof of fraud.

5. Usury.—The fact that the negotiator of a loan, who personally guaranteed the paper, received a large compensation for so doing, does not vitiate a conveyance made to him in settlement of a part of the loan which he was afterwards compelled to take up.

6. *It seems*, that an assignee cannot set aside a transaction of the bankrupt on the ground of usury.

Jenkins, Assignee, etc., vs. Einstein.

7. Sale to Attorney—When Valid.—To set aside a conveyance made to his attorney by a party in embarrassed circumstances, it must be shown that he had been consulted in regard to the particular transaction, or that he was in a position to take an unfair advantage.

8. The fact that their relations were intimate and that the vendor expected to be able to re-purchase on favorable terms, does not make the conveyance a simple security for indebtedness.

9. Depreciated Notes.—The fact that a part of the consideration was the paper of the firm to which vendor belonged, which was then only worth a part of its face, does not, at common law, vitiate the transaction.

10. Loose Conversations.—Loose conversations or statements should not be allowed to change the character of a conveyance, and subsequent parol promises by the vendee to give the vendor the advance in the property, and offers to convey to any one who would take it off his hands, are without consideration, and cannot be enforced either in law or equity.

This was a bill filed by Robert E. Jenkins, assignee of John K. Pollard, against Morris Einstein, Arthur D. Rich and Calvin P. Austin, to set aside a conveyance of certain real estate made by Pollard to Rich, and alleged to be with intent to hinder and delay his creditors.

During the year 1866, and for several years prior thereto, Pollard was engaged in business in Chicago as a member of the firm of Pollard, Doane & Co., a wholesale grocery house transacting a large business and in good credit, and also of the firm of R. M. Whipple & Co., real estate agents and general speculators. The defendant Rich, a lawyer of the same city, had frequently acted as attorney for Pollard and had had considerable financial transactions with him, and had, from time to time, advanced him sums of money. In June, 1865, the firm of R. M. Whipple & Co., then claiming to be entirely solvent, was pressed for money and applied to Rich for a loan of $20,000, and through his influence the loan was procured from third parties on the notes of R. M. Whipple & Co., who paid Rich for his commission in the negotiation the sum of $3,750, Rich personally guaranteeing $15,000 of the notes. This loan was procured at the express request of Pollard, who gave his personal promise to Rich to see it paid.

Part of the notes were paid by the firm, but the balance

Rich was compelled to take up, and in October, 1866, Rich still held $8,000 of the paper. At that time the affairs of R. M. Whipple & Co. had become badly embarrassed, and Pollard became alarmed in regard to its effect upon his grocery firm. At Pollard's request Rich then went with him to consult Whipple at Pithole, Pennsylvania, in regard to paying or securing this paper, and arranging for other liabilities of the firm then past due; but nothing was accomplished.

On the 16th day of November, Pollard conveyed to Rich certain property on Fourth avenue, Chicago, for the expressed consideration of $25,000, made up as follows: Notes of R. M. Whipple & Co., held by Rich, $8,000; mortgage notes, guaranteed by Whipple, $3,000; checks of R. M. Whipple & Co. to J. K. Pollard, $9,000; and the balance, $5,000, in Rich's own note, due in one year, secured back on the property. At the same time he also conveyed to Rich certain property on the corner of Wabash avenue and Thirteenth street, for the expressed consideration of $15,000, as follows: $5,000 in cash, and his two notes for $5,000 each for the balance, due in twenty and thirty days, respectively, which notes were paid on maturity.

On the 11th of March, 1868, Rich conveyed to Austin the Wabash avenue property for $26,000, cash. On the 15th of January, 1869, he conveyed the Fourth avenue property to Einstein for $26,500; $14,000 cash and $12,500 secured back by mortgage on the property, which mortgage Rich still owned at the time of the suit; and the bill charged the purchasers with notice of all of complainant's equities as set up in the bill.

Prior to the execution of the deeds by Pollard to Rich two judgments had been recovered against him in the Superior Court of Chicago, amounting to over $10,000, upon which executions were issued and levied, and the property sold at sheriff's sale.

Rich knew nothing of these judgments until after the sheriff's sales, and soon after the time for redemption had expired, he

bought them up for $13,000, taking a conveyance from the purchasers to himself.

Rich, in his answer, denied all allegations in the bill charging him with fraud, and insisted that he was a *bona fide* purchaser for a valuable and adequate consideration.

The facts further appear in the opinion.

George F. Harding and *Milton T. Peters*, for complainant.

The creditors, or the assignee, have the right to avoid a conveyance prior to their right or lien, by showing it usurious or fraudulent. *Dix vs. Van Wyel*, 2 Hill, 522; *Post vs. Dent*, 8 Paige, 632; *Thompson vs. Van Vechten*, 27 New York, 568; *Schoepel vs. Corning*, 5 Denio, 236; *Valentine vs. Conners*, 40 New York, 254.

Conveyances made with intent to defraud or defeat creditors will be void, although there may be in the strictest sense a valuable consideration, nay an adequate consideration. 1 Story's Equity Jurisprudence, § 369; *Rogers vs. Evans*, 3 Black. 576; *Meyer vs. McCullough*, 1 Carter, 339.

This is a secret reservation of the surplus of the value of the property, viz., of a benefit in the right of redemption upon a conveyance absolute in form. This is admitted to be fraud by all courts. *McCulloch vs. Hutchinson*, 7 Watts, 434; *Smith vs. Lowell*, 6 New Hampshire, 67; *Smith vs. Smith*, 11 do., 460; 1 American Leading Cases, 71.

An attorney cannot buy of or against his client. He has a duty to perform inconsistent with the character of purchaser on his own account. *Van Epps vs. Van Epps*, 9 Paige, 237.

He is a trustee. *Howell vs. Baker*, 4 Johnson's Chancery, 118.

The principle that a client is protected in his contracts with his attorney is deemed so important that the client is allowed to set aside a fraudulent assignment to his attorney; prevailing over general rule that one party to a fraud, standing on equal footing, cannot be relieved against the other. *Ford vs. Harrington*, 16 New York, 285; 1 Story's Equity Jurisprudence, 300–10; *Thalimer vs. Brinkerhoff*, 20 Johnson, 396; *Osborne*

vs. Williams, 18 Vesey, 379; Anonymous, 16 Abbott's Practice R. 423.

Courts should set aside or disregard them. Presumption is that they are unfair. Story's Equity Jurisprudence, 310–13; *Jennings vs. O'Connell*, 17 Illinois, 148; *Evan vs. Ellis*, 5 Denio, 54; *Mason vs. King*, 11 Paige, 467; *Case vs. Carroll*, 35 New York, 285; *Hutchings vs. Van Brunt*, 38 New York, 335; *Bock vs. Barnes*, 40 Barbour, 521; *Stair vs. Vanderheyden*, 9 Johnson, 258; *De Rose vs. Fay*, 3 Edwards, 369; *Howell vs. Ranson*, 11 Paige, 538; *Jones vs. Thomas*, 2 Younge & Collyer, 517; *Wood vs. Downes*, 18 Vesey, 120; *Bellew vs. Russell*, 1 Ball & Beatty, 96; *Arden vs. Patterson*, 5 Johnson's Chancery, 44.

Rich & Thomas, for defendant Rich.

When the transaction between client and attorney is disconnected from that relation, they stand upon the rights and duties common to other persons. Story's Equity Jurisprudence, §§ 310, 313, and notes, and cases cited; *Montesquieu vs. Sandys*, 18 Vesey, 313.

To rescind a contract on the ground of inadequacy of consideration it must be shown to be grossly inadequate. *Baldwin vs. Dunton*, 40 Illinois, 195; *Osgood vs. Franklin*, 2 Johnson's Chancery R. 23.

Parol evidence of any contemporaneous conversation, understanding or agreement of the parties, inadmissible to show that a deed absolute on its face, was only intended as a mortgage. *Sutphen vs. Cushman*, 35 Illinois, 19; *McArtee vs. Engart*, 13 do., 242.

Rosenthal & Pence, for defendant Einstein.

Blodgett, J.: The whole case centers around this transaction, the complainant alleging that it was fraudulent: 1st. Because it was made with intent to hinder, delay and defraud the creditors of Pollard. 2d. Because Pollard was imposed upon as to the amount of indebtedness held by Rich against

him and against the firm of R. M. Whipple & Co. 3d. Because Rich occupied a confidential relation to Pollard as his attorney, and took advantage of that relation to impose upon him. 4th. That if the conveyances are valid for any purpose, they are in the nature of security for the actual indebtedness existing, and should only be held valid to that extent; that an account should be stated between Pollard and Rich, and redemption allowed upon payment of the amount found due, it being assumed that the evidence establishes the fact that there was an express contemporaneous agreement between them, that any advance in the value of the property should enure to the benefit of Mr. Pollard.

1. Were these deeds made with intent to hinder, delay or defraud the creditors of Mr. Pollard?

This transaction was on the 16th day of November, 1866. As the law then stood, debtors in failing circumstances were allowed to prefer their creditors, and our courts sustained such preferences where there was no fraudulant act as between the parties, enabling the creditor preferred to absorb an undue share of the property. It will be seen from the evidence in the case, that there was some *bona fide* indebtedness which Pollard was both legally and morally bound to pay. The evidence of Rodney M. Whipple has been taken in this case with a view to reduce the aggregate amount of this indebtedness. This witness had been guilty of the grossest breach of trust towards Rich, in the abstraction of a part of his collateral securities for this indebtedness. He had, on one occasion, visited Rich, and assured him that a certain collateral note held by him, would be paid that day if presented, and that he would collect and return the money. Rich entrusted him with the note. He obtained the money and converted it to his own use, thereby rendering himself a proper subject for criminal prosecution. But on the faith of Pollard's pledge that no harm should ultimately result from this transaction, Rich did not prosecute.

Pollard's evidence is also taken, and he attempts to explain

and show that by various transactions, from time to time, he had succeeded in reducing this indebtedness. But Rich held the notes referred to; he had Pollard's personal pledge that he would see them paid; he had made the transaction with Whipple & Co. on the strength of that pledge; and, taking the testimony of the defendants, in connection with the vouchers presented, it is much more satisfactory and conclusive, and, balancing all the testimony together, I have no doubt the weight and preponderance of proof is, and I am clearly of opinion that such an indebtedness existed, swelled by accrued interest, to nearly or quite the amount claimed by Rich.

It is strenuously urged that some portion of this indebtedness was made up of usurious interest and fictitious amounts which ought not to be allowed. I will not now discuss the question of usurious interest. This is not a bill to set aside the transaction for usury, and I doubt whether the creditors of Pollard could have relief on that ground.

Again: Even if this transaction was made by Mr. Pollard with fraudulent intent, his intentions alone will not control; we must ascertain the intention of *both* of the parties to the conveyance. The evidence is very conclusive that Mr. Pollard, up to this time, had maintained a high character for commercial integrity. But the affairs of R. M. Whipple & Co. had got into such condition that financial ruin was staring him in the face. He may have thought that if he turned this property over to Rich, and was subsequently able, by the improvement in the affairs of R. M. Whipple & Co., to pay the liabilities of that firm, Rich would be much more ready to give him back the property without profit, or at only fair rates of interest on the money invested, than a stranger. It is a natural inference, from all the testimony developed in the case, showing the intimate and friendly relations which then existed between them, that under the circumstances Pollard would have preferred to deal with Rich, rather than a stranger.

The alleged inadequacy of price is another circumstance

which is seized upon by the complainant in this case to establish the intent of fraud, and it becomes necessary that I should examine the testimony carefully to see whether the charge of inadequacy is made out. There is no doubt that where a debtor in failing circumstances, or actually insolvent, conveys his property to a creditor, even by a legal preference, for a grossly inadequate price, such conveyance is fraudulent as against other creditors. He has no right to cover up and conceal, or spirit away more property than is necessary to pay the creditor whom he legally prefers; the preference must be fair and just.

With reference to the value of the property, the evidence of several prominent real estate dealers has been taken in the case, and there is no very great discrepancy in their testimony as to the actual value of the Wabash avenue property, aside from the improvements. They rate the ground in November, 1866, from $200 to $300 per front foot. With my experience in regard to the discrepancy between witnesses in estimating the value of property at an anterior date, I am not surprised at these various estimates. The disparity is mainly in regard to the value of the improvements, some of the witnesses claiming that their value was merely what the house was worth to move off; that when the property reached a value of $250 per foot, a single wooden dwelling house upon it would not rent for enough to pay a fair profit on the investment, and that it was necessary to remove the old building and erect one of such character that the rental will return a fair profit on the investment. And this seems to be a business-like view to take of the subject. Of course there may have been a speculation in it; the property may have advanced from causes the parties had no right to anticipate. But when a man with money is asked to buy property in Chicago, and pay in cash, the question he would naturally ask himself is, whether he can obtain a fair income on the money he pays? It is very obvious from the testimony that the rental of this single house, standing on these lots, would not have afforded much income on the

investment, at the price per front foot which the witnesses estimate it worth.

I therefore conclude that the evidence in regard to the value of the Wabash avenue property does not justify the court in assuming that it was worth, at that time, in cash, more than $15,000 to $18,000. The court must take notice of the fact that there is a wide difference between buying on small margins, expecting to realize out of the advance in price, and buying for cash. These speculative terms, known as "canal time," or one to five years, make widely different transactions from one where cash in hand is paid. In the latter case the purchase must be at such price as will sustain the investment. Nearly all of complainant's witnesses place the value of the house at about $10,000. It may have cost that; it was a well built house; was built by Mr. Pollard for his own home, and may have had that value to him in that place. But when the property is considered by the capitalist as an investment, it must be looked at from another stand-point. The defendant's witnesses, on the contrary, estimate the house at about what it would be worth to move off; from $1,500 to $5,000.

There is another consideration: The testimony of most of the witnesses was taken within the last year, nearly four years after the time of these transactions. It is conceded that there has been a very large advance in the price of property in the vicinity during that time. Now it is almost impossible for witnesses to recur to prices at that time, and state, with any approach to accuracy, its value at that remote period. Their present opinion will be influenced by the subsequent advance. The Supreme Court of this state, in the case of *Baldwin vs. Dunton*, 40 Illinois, 196, say: "It is not easy for the fairest and most unprejudiced mind, after a length of time, to recall with accuracy former values of property, and this is especially true where there has been a large appreciation in prices. Under such circumstances it is difficult to fix the true value of property at an anterior date. * * To require a rescission the consideration must be *grossly* inadequate." This is the

rule laid down by all the authorities in regard to the rescission of contracts for inadequacy of consideration. The consideration must be so inadequate as to strike the mind at first blush as far below the actual value of the property, and to clearly indicate the existence of some unfair dealing, some fraud, imposition, or oppression by the purchaser. *McArtee vs. Engart*, 13 Illinois, 242. The rule is well stated by Chancellor KENT, in *Osgood vs. Franklin*, 3 Johnson's Chy. R., 23. He says: "There is no case where mere inadequacy of price, independent of other circumstances, has been held sufficient to set aside a sale made between parties standing on equal ground, and dealing with each other without imposition or oppression; and the inequality amounting to fraud, must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense."

It is also urged as a badge of fraud in this case that Rich bought without an examination of title; without being furnished with an abstract; without any such precautions as purchasers usually require. But the answer to that is, that he had been the attorney of Pollard, and knew, or thought he knew, substantially the title, and was willing to take the property with Pollard's warranty deed, without a very careful examination. The result shows that he was a loser by the transaction, because it turned out that there were prior judgment liens upon the property, which Rich was subsequently compelled to pay, to the amount of over $13,000, in order to protect his title acquired by the deed.

2. Was Pollard imposed upon as to the extent of debts which Rich had against him?

Pollard himself does not now attempt to swear that he was. But Whipple swears that a part was paid and the balance was usury. It will be borne in mind that Pollard agreed to give Rich $3,750 bonus for negotiating the loan in June, 1866, and that some of the notes given for this loan were reckoned in the indebtedness which was paid by Pollard at the time of the conveyances, and it is claimed that this bonus should be

deducted. But Rich only acted as negotiator in obtaining the loan; both Whipple and Pollard knew that he did not pretend that he was loaning his own money. It is true he was receiving a considerable commission, but they had a right to estimate the value of his services; it is not for the court to say what was the value. The negotiation was for a large sum, and Rich guaranteed a large portion of the debt to the parties from whom the money was obtained, and subsequently had to pay it. I do not think it lies in the mouth of this complainant to question that transaction. It was a debt acknowledged by both Whipple and Pollard, and so far as this court is concerned, is to be held valid. I do not think the charge of imposition in regard to the extent of indebtedness is made out.

3. Did Rich occupy such confidential relations as prohibited his buying Pollard's real estate?

The evidence shows that Mr. Rich had been the attorney of Pollard for many years. Pollard says that he had other attorneys, but the weight of evidence is that Rich had acted as his attorney more frequently than any other person. They had also been intimate friends. But there is no evidence that Pollard consulted Rich as his attorney, or that Rich was in any position to take advantage of him. He undoubtedly had the hold on Pollard which one friend has upon another when that other is in straightened circumstances. He would naturally prefer, if he could pay but one debt, to pay that of his friend. Pollard was fully aware of the value of the property, and in all respects capable of acting for himself. Indeed he seems to have been much more sanguine in regard to the future value of the property than Rich or other persons. Nor does there seem to have been any influence to control his own independent judgment in regard to it. There is no proof in the case that Rich was consulted as the attorney of Pollard in regard to the transaction, or that his advice as a lawyer either suggested or consummated the bargain. The rule laid down by Judge Story is, that when the transaction between client and attorney is totally disconnected with the relation, and concerns

objects and things not embraced in or affected by, or dependent upon that relation, they stand upon the rights and duties common to all other persons and may deal with each other. 1 Story Eq., Jur., § 313. In the case of *Montesquieu vs. Sandys*, 18 Vesey, 313, Lord Ch. ELDON says: "There is no authority establishing, nor was it ever laid down, that an attorney cannot purchase from his client what was not in any degree the object of his concern as attorney, the client making the proposal himself, proposing the price, no confidence asked or received in that article, and both ignorant of the value. Under such circumstances he is not the attorney *in hac re*, and therefore, not being under any duty as attorney to advise against the act, he may be the purchaser."

4. Were the conveyances made by way of security only, for actual indebtedness then existing?

Pollard had pledged his honor that Rich should lose nothing by the loan to R. M. Whipple & Co.; he had no money with which to meet the obligation; he felt pressing upon him the duty and necessity of seeing that debt paid, and like an honest man he proposed to give what he had, which was the Fourth avenue property, Rich paying him the difference between its fair value and the amount of the indebtedness he then held. He had negotiated a sale of the Wabash avenue property to Pierce, but afterward learned that possibly Rich might be willing to buy it at the price for which he had proposed to sell, and at once replied that he "would prefer to sell to Rich; he is an honorable man, and is straight in every particular; he has no mean tricks about him." Now, there is no evidence whatever that the sale of this property to Pierce, then contemplated, was to be any other than a *bona fide*, absolute sale, and for the same price for which it was subsequently sold to Rich. My conclusion is that when Pollard found that Rich was disposed to buy, his mind at once jumped to the conclusion that he would prefer to sell to him, because, if successful in extricating himself from his embarrassments, he could more readily re-purchase from his friend than from a stranger. If

sold to Pierce it was irrevocably gone, while if sold to Rich he had the anchor of friendship to his hopes that it might be subsequently returned to him on some fair terms; and he, therefore, without hesitation, dropped at once the negotiation with Pierce for the sake of selling to Rich.

It is urged very strenuously on the part of the complainant that the paper of R. M. Whipple & Co., which was turned out in part payment for the property, was not then worth over ten cents on the dollar. It does not lie in the mouth of this complainant to make this averment. R. M. Whipple & Co. and Pollard, as a member of the firm, owed Rich, and as long as Pollard had money or means to pay, it did not lie in his mouth to say it was worth any less than its face. Preferences were then allowed and Rich had a right to secure such preference; and, therefore, the argument in regard to the then value of the paper has no weight on my mind.

All the testimony in regard to Pollard's transactions about this time shows this was the theory on which he proceeded; that he was paying Rich a personal obligation, and converting what remained of his property into means with which to pay those of his individual creditors to whom he felt under strong personal obligations. His relations with Rich were such, perhaps, as justified him in expecting the fairest treatment at his hands. But I see nothing in the testimony to show that Rich ever abused his professional or friendly relations with Pollard. I think the evidence shows rather that he made the purchase with reluctance and hesitation; that he would have preferred the money due him from Pollard and Whipple. In the case of *Baldwin vs. Dunton*, before cited, the court says: "We are aware of no rule which prevents a friend, however intimate, from purchasing property of another; one friend or a relative has the unquestioned right to trade with another. And such considerations usually induce the giving a preference to a relative or a friend, rather than to a stranger, where a party is compelled to sell property at a bargain." In this case, undoubtedly, the property was sold at a bargain; undoubtedly Rich

expected to make money out of it. But grant the full force of the rule insisted on by complainant, and even then was this transaction such that it shall only be treated as mortgage to Rich for the amount of his present claim against Pollard or against R. M. Whipple & Co.? In *Sutphen vs. Cushman*, 35 Illinois, 193, the Supreme Court of this state lay down the rule that parol evidence of what was said at the time the deed was made, and of any understanding or agreement of the parties independent of the deed, cannot be introduced to show that a conveyance, absolute on its face, was only intended as a mortgage. This rule shuts out from consideration all that Pollard, Waterman and Whipple testify to, in regard to any understanding or agreement of the parties, at the time the deed was made. The relations between the parties may be shown, and the facts and circumstances surrounding the transsaction; but loose conversations and statements, which one or both of the parties may have indulged in as to what their intentions were, are not evidence to change the character of the document itself. If the relation of debtor and creditor existed at the time when the deed was executed, and continued thereafter; if the creditor retained the evidence of indebtedness and sought to enforce the original obligation of the debtor—that furnishes conclusive evidence of the character of the transaction as regarded by the parties themselves, and the courts, in such case, say that the deed, though absolute on its face, is to be considered a mortgage.

But in this case the evidence is very satisfactory that the paper forming part of the consideration of the Fourth avenue property, being notes and memorandum checks, as before stated, to the amount of $20,000, including accrued interest, were, upon the execution of the deed, put in an envelope and handed to Pollard; that after keeping them some time in his possession, he went into Rich's office and asked if he would keep them for him, stating that he did not want the boys at the store to know too much about his private business; that Rich refused to take them, and they were then handed over

to Waterman, who laid them in the safe, where they remained with the seal unbroken until some months afterwards, when they were taken out by Pollard and have since been in his possession. There has been no claim of the continuance of the relation of debtor and creditor since that time; Rich has not sought to enforce the payment of these debts against Whipple or Pollard. He took immediate possession of the purchased property. The tenants in possession of the houses on Fourth avenue at once attorned to him and continued to pay rent to him until Einstein bought the property. Pollard, within a few days, took a lease of the Wabash avenue property, and though he has not paid much rent, it is very evident that is not because Rich did not demand it. When the taxes became due, even for the current year, the tax collector was sent to Rich, by Pollard, and he paid them, and has continued to pay all taxes and assessments on the premises from that time to the commencement of this suit.

There is a large amount of testimony in the case, consisting mainly of declarations made by Pollard, his statements of what he considered to be the transaction, and verbal promises made to him by Rich, such as that he would give him the advance or rise on the property. The objection to this testimony is simply that these were merely parol promises, which, if made at all, were without consideration and which cannot be enforced either in law or equity. The relation of debtor and creditor had ceased, as before stated, and there seems to be no reason for assuming that these declarations made by Rich, from time to time, during the ensuing year, were anything more than the good-natured promises of one friend to another, which he was under no legal obligation to carry out. The evidence is that Rich, within a year after this transaction, did offer repeatedly, to deed the property to any one whom Pollard would get to relieve him. My inference from all this is that he was then willing to part with the property for what it had cost him.

It is clear to my mind that it is not the duty of a court of equity to change the terms of an absolute deed, unless the

testimony upon which you seek to do it is of so unquestioned a character as to satisfy the court that in doing so, it is not doing injustice rather than justice to the parties. Rich, for all that appears here, was acting with entire fairness. I can see nothing in the evidence which shows any disposition on his part to act unfairly, and nothing since the case commenced that shows any disposition to do more than to protect his rights against the imputations and charges brought against him.

The proof, then, in my estimation, falls far short of establishing either of the propositions on which the complainant claims to recover. I shall, therefore, be compelled to find the issues made in the case for the defendants, and dismiss the bill.

This view of the case relieves me from the consideration of the relation which Einstein and Austin bear to the title.

Bill dismissed.

That an assignee in bankruptcy cannot avoid a mortgage given by the bankrupt, on the ground of usury, see *Bromley, assignee, etc., vs. Smith*, Vol. 2 of this Series, 511. [*Reporter.*

In re McGILTON.

CIRCUIT COURT—WESTERN DISTRICT OF WISCONSIN—SEPTEMBER TERM, 1871.

IN BANKRUPTCY.

1. SALE BY ASSIGNEE—WHEN JUDGMENT LIEN NOT DEVESTED.—Where an assignee petitions to sell real estate of the bankrupt, subject to certain specified liens, and it is so ordered, a sale by the assignee *free from all liens* does not devest the lien of a previous judgment creditor, no reference having been made in either the petition or order to any liens other than those specified.

2. EFFECT OF CONFIRMATION BY COURT.—If the report shows a sale free and clear of all incumbrances except those named, a simple confirmation by the court is not equivalent to an authority, and does not discharge such liens. To effect that it must expressly appear that knowledge of this excess of power exercised by the assignee, was brought to the knowledge of the Court, or that the *report* was ratified *as such*.

3. PRESENCE OF JUDGMENT CREDITOR—at the sale by his counsel, would not estop him, there being no authority to sell free and clear of his judgment.

4. HOW CREDITOR MAY PROCEED.—It is competent for the Court in Bankruptcy to authorize a creditor to proceed in the usual way to collect his debt, if that course seems best for the estate.

This was a revisory petition, under the second section of the bankrupt act, filed by Samuel A. Jewett, a purchaser of real estate at assignee's sale, to set aside an order of the District Court, authorizing Robert Corbett, a previous judgment creditor of the bankrupts, to proceed upon his execution, and satisfy his judgment out of the property sold by the assignees to Jewett.

The facts in the case and the claims of the respective parties are stated in the opinion.

Finches, Lynde & Miller, for petitioner.

By the rules of construction uniformly adopted by the courts,

as to contracts, statutes, and orders and decrees, the order of sale in this case was the same in its import and meaning as if it read subject to the incumbrances therein named, and free and clear of all other incumbrances. If it was not intended to sell free and clear of all incumbrances except those named, why were any named?

If the assignees were to sell the property subject to incumbrances, they had full authority by virtue of the bankrupt law, without any application to the court. *In re McClellan*, 1 Bankrupt Register, 91; *In re Mebane*, 3 do., 91; *Kelly vs. Strange*, Id., 3.

It was only necessary to apply to the court for an order of sale where it was sought to sell the property free and clear of incumbrance, and it was for this purpose the application was made to the court, and the order of court obtained to sell subject to certain incumbrances.

The mention of these incumbrances in the order of sale necessarily negatived all idea that the sale was subject to other incumbrances, upon the familiar maxim, *expressio unius est exclusio alterius*. *Allen vs. Dykes*, 3 Hill, 595; *Philadelphia, etc., Railroad Company vs. Howard*, 13 Howard, 340; *Wait vs. Wait*, 4 Comstock, 101; *Morey vs. Farmers Loan & Trust Company*, 14 New York, 306; *Curtis vs. Leavitt*, 15 do., 259; *Sill vs. Village of Corning*, Id., 306; *People vs. Draper*, Id., 568; *Methodist Episcopal Church vs. Jaques*, 3 Johnson, C. C., 110; *Atkins vs. Bordman*, 20 Pickering, 304; *Commonwealth vs. Kneeland*, Id., 230; *Jordan vs. Dennis*, 7 Metcalf, 391.

For what purpose were these incumbrances specifically mentioned, unless it was intended that the sale should be subject to those incumbrances alone? It was evidently the intention of the assignees in making their application to the court, that the real estate should be sold subject to the incumbrances named, and none other. They so announced at the sale, and the property was sold with that understanding to the petitioner, who paid full value therefor.

It is a general principle that the district court is possessed of the full jurisdiction of a court of equity, over the whole subject-matters which may arise in bankruptcy. *In re Foster*, 2 Story, 131. And supposing that the assignees and the purchaser were mistaken as to the construction of the order, the subsequent confirmation of the sale by the court ratified the sale and confirmed the title in the purchaser. The purpose and object of a master in chancery, or commissioner or assignee in bankruptcy, making a report of their sales to the court for confirmation is to inform the court of the terms of the sale, and the manner in which it was made, that the court may ratify it, if correct, and in accordance with the decree or order of court; and, if not, that the court may refuse to order a deed and set the sale aside, and order a re-sale in accordance with the original decree.

The master or trustee is the mere attorney of the court, acting under a specially delegated authority, and in no case is he authorized to do more than to accept an offer or proposal to contract, which is of no validity unless it be accepted, ratified, and confirmed by the court. It is the court itself, for the benefit of all interested, therefore, who is the vendor in such cases. *Anderson vs. Foulke*, 2 Harris & Gill, 353; *Blasson vs. Railroad Company*, 3 Wallace, 207.

When one purchases premises at a master's sale, under the understanding expressed at the time of the sale that he was to have a perfect title under the decree, or a title free from all incumbrances except those stated, and the master's deed will not give him such a title, he may be discharged from the obligation of his purchase. *Morris vs. Mowatt*, 2 Paige, 589; *Lawrence vs. Cornell*, 4 Johnson, 545; *Seaman vs. Hicks*, 8 Paige, 658.

Assignees in bankruptcy are as much bound as any other description of vendors to show a good title to any property they offer for sale in the ordinary manner. *Cooper vs. Denne*, 1 Vesey, 565, note; *McDonald vs. Hanson*, 12 Vesey, 278. Where they contract to sell an estate generally, they are bound

as other persons to make a title to the inheritance free from incumbrances. *White vs. Foljambe*, 11 Vesey, 337; *Pope vs. Simpson*, 5 do., 145, and note 1; 2 Sugden on Vendors and Purchasers (6 American edition), 152, 153.

These decisions are under the English bankrupt law, where the court has no such power as under our law, to sell free and clear of existing liens, and where the assignee is not regarded as the officer of the court, and the sale is not considered, as with us, a sale by the court. But in this case the sale was made by order of the court, by the assignees, under the direction of the court, and all the facts were reported to the court, and special mention made of the fact that the premises were sold free and clear of all incumbrances, except those specially mentioned. The district judge, in his opinion, says that his attention was not called to this clause. But this was not the fault of the purchaser. A party who invests his money on the faith of an order of court should be protected in his investment, and it is not incumbent on him to prove that the court did what it was its duty to do—know what order it was making. He has a right to presume that the court has done right. *Burnett vs. Howill*, 2 Schoales & Lefroy, 577.

The jurisdiction of the district court as a court of bankruptcy extends to the collection of all the assets of the bankrupt, to the ascertainment and liquidation of the liens and other specific claims thereon, and to the adjustment of the various priorities and conflicting interests of all parties. The liens sought to be created against the purchaser are judgments against the bankrupt. A judgment lien on land constitutes no property or right in the land itself. A judgment creditor has no *jus in re*, but a mere power to make his general lien effectual by following up the steps of the law. *Massingill vs. Downs*, 7 Howard, 767; *Becker vs. Morton*, 12 Wallace, 158; *Conrad vs. Atlantic Insurance Company*, 1 Peters, 443.

In chancery the general lien of a judgment is controlled by equity so as to protect the rights of those who are entitled to an equitable interest in the lands or in the proceeds thereof.

Ellis vs. Tousley, 1 Paige, 280; *Buchan vs. Sumner*, 2 Barbour's Chancery, 165.

The order to sell subject to certain incumbrances is equivalent to an order that the purchaser pay those incumbrances out of the purchase money. The court has, therefore, applied the full value of the property in payment of the prior liens, through the purchaser, who, at least, is entitled to be subrogated to the rights of those lien creditors whose liens have been paid. An incumbrancer has no right to complain when the property on which he has a lien is exhausted in the payment of prior liens.

But if the court is of opinion that Corbett is entitled to relief, and should be allowed to sell, it should be upon the condition that he will file an offer to bid the premises up to the full amount of all liens prior to that judgment. The universal rule is that the party applying after confirmation of sale to set the same aside (in the absence of fraud) must offer to increase the bid.

John E. Stillman, for judgment creditor.

DRUMMOND, J.: The facts in this case are, that John McGilton and his partners were declared bankrupts by the decree of the district court. Assignees were appointed, and made application to the district court to sell some real estate on which were certain liens and incumbrances. The petition to the district court set forth the character and amount of the incumbrances, and asked that they have leave to sell the real estate, subject thereto. The district court thereupon made an order authorizing the assignees to sell the real estate subject to the incumbrances named. No mention in that petition was made of the judgment of Corbett against the bankrupts, nor any other liens than those described in the petition, nor did Corbett have any notice of the application.

Samuel A. Jewett was the purchaser at the sale. Thereupon a report was made by the assignees to the court, setting forth the application, the incumbrances, sale of the property, and

purchase by Mr. Jewett; also declaring in the report that the sale was made "free and clear of all other liens and incumbrances, except those named."

The sale was confirmed by the district court. The particular order by which the sale was confirmed is not set out in the petition. The language of the petition is that the report of sale was confirmed; but in the absence of any evidence of the particular phraseology of the order by which the confirmation was made, the inference must be that it was simply an order confirming *the sale.*

The proceeds of the sale were distributed under the order of the court, exclusively in defraying the costs and expenses. The incumbrances, it should be borne in mind, upon the property, amounted to quite a large sum — over twenty thousand dollars, as stated in the petition—which of course the purchaser had to pay in order to get a title to the property.

After these proceedings took place in the district court, Robert Corbett made application to the district court to obtain satisfaction of a judgment which he had against the bankrupts, and which he claimed was a lien upon their real estate, and asked that it should be paid out of money in the hands of the assignees, or that he should have satisfaction out of the property of the bankrupts. After hearing this application, upon answer made by the assignees, and by Mr. Jewett, the purchaser at the sale, the district court made an order authorizing Corbett to proceed by execution, and have his judgment satisfied against the property. This judgment had been recovered in a state court, against the bankrupts more than six months before proceedings in bankruptcy were commenced.

It is this order which the petitioner Jewett seeks, under the second section of the bankrupt law, to set aside, on the ground that the sale was made of the property free from all incumbrances, and that the purchaser acquired a good title.

It will be observed from the statement which has been made, that the petition of the assignees to the district court simply

requested, and the order of the court directed, that the property should be sold subject to the liens specified. It made no reference whatever to any other liens. It was not asked, nor was it authorized, that the property should be sold free and clear from all incumbrances other than those named.

And when the report was made, it contained what was not in the petition, nor in the order of the court, namely, that it was sold free of all incumbrances, except those named. That was inserted in the report, and, as I think, without authority.

Now, under such circumstances, it is clear, if it be conceded that the district court had the right (as to which I give no opinion) to effect the sale of the property free and clear of all incumbrances, by a simple ratification of the language of the report, then it should explicitly appear in the order of confirmation that *the report* was confirmed, and that the sale, which it is alleged the assignees made free from all incumbrances except those named, was confirmed as such, so as to show that the court acted upon that part of the report, and confirmed the sale by making it free and clear from all other incumbrances.

That would be indispensably necessary, I think, under the circumstances, in order to make it binding upon the court, because it could be only effectual by a ratification brought home to the knowledge of the court of this clause in the report of the assignees.

They were acting under a power. They were bound to follow the instructions of the power. If it was sought to be enlarged the court ought to have known of that enlargement, and ratified and confirmed it as such. Now, there is nothing to show, except what appears upon the face of the record, that this particular part of the report was brought to the knowledge of the court, and that it ratified that part. On the contrary, it is apparent, from the opinion of the district judge in deciding the question, that it was not done.

It is said in the petition that at the sale Mr. Corbett was present by his counsel, and made no objection. It does not appear what action the court took upon this point, or whether

there was any proof heard before the court. In other words, it does not appear that the district court considered the question, or decided that Corbett, by being present through his counsel at the sale, and making no objection, was estopped from setting up a claim under his judgment. And therefore this court cannot consider that as a question properly before it for revision. Concede that were so—that by being present at the sale under certain circumstances, and making no objection, he would be estopped — it is sufficient to say that if he were present at the sale, which is denied by an informal answer put in, all that appears is that he was present with the knowledge of the authority which had been given, to sell, subject to certain judgments; and Corbett's judgment was not named in the list, neither in the petition nor in the order of the court, nor in the report of the assignees, nor in the confirmation in any way. And the district court never had any knowledge, it is fair to presume, of this judgment, until the petition was filed by Corbett. So that if he was present at the sale by his counsel, he was present in contemplation of law only with knowledge of those facts which were stated in the petition of the assignees, and in the order of the court. Whether he would be bound by an unauthorized statement made by the assignees at the sale, might admit of serious question.

We must concede that the bankrupt court had control of the property, because it was a simple lien, and the bankrupts owned the property, subject to the lien, and it passed to the assignees as the property of the bankrupts, subject to the lien. Still, if valid and subsisting, it could not be destroyed so long as the property which was bound by it remained under the control of the assignees, and of the court. Now, in the case as it is presented, the court must presume that this lien was a valid and subsisting lien, that it was not in violation of the bankrupt act, and I have no doubt, therefore, that the judgment of the district court was right—that this party is entitled to have satisfaction out of the property of the bankrupts.

It is to be observed that Corbett could not proceed upon his

judgment without the consent of the bankrupt court. It is sometimes the case that creditors, who have judgments, proceed to sell the property covered by the lien of the judgment, where it has passed by law to the assignees; but the courts have uniformly held those sales were invalid, if made without authority of the bankrupt court. If it be admitted the court, where there are liens on real property of the bankrupt, can order it to be sold free from the liens, to marshal the assets and pay off the liens, it is equally competent for the court to authorize the creditor to proceed in the usual way to collect his judgment, if that course seems best for the estate.

The decree, therefore, of the district court will be affirmed, without prejudice to the right of the assignees to contest the judgment which Corbett has obtained, if they are advised that it can be done as being in fraud of the bankrupt act, or otherwise invalid.

As to the power of the Court of Bankruptcy to sell property free from liens, the liens being transferred to the funds in court, consult also *In re Stewart*, 1 Bankrupt Register, 42; *In re Barrow*, Id., 125; *In re Schneif*, Bankrupt Register Supplement, 41; *In re Salmons*, 2 Bankrupt Register, 19; *Foster et al. vs. Ames*, Id., 147. In which latter case the authorities under the act of 1841 are examined and declared applicable to the present Act.

Unless by order of the court, the assignee sells subject to any and all lawful incumbrances. *In re Melane*, 3 Bankrupt Register, 91; *Kelly vs. Strange*, Id., 2. [*Reporter*.

In re HELLER.

DISTRICT COURT—WESTERN DISTRICT OF WISCONSIN—SEPTEMBER TERM, 1871.

IN BANKRUPTCY.

SUFFERING PROPERTY TO BE TAKEN.

1. Under section 89 of the Bankrupt Act it is not necessary that the debtor should be an actor in promoting the taking of his property; the suffering it to be taken is a violation of the act.

2. It is the duty of an insolvent man, when sued, to take measures to secure the equal distribution of his property among his creditors; and if he makes no defense to the actions, does not notify his other creditors of such suits, nor do anything to prevent the obtaining a preference, he suffers his property to be taken within the meaning of that section.

3. When a debtor suffers an act which he might prevent, and the necessary consequence of which is to give a preference to certain creditors, the law presumes that he intended such result.

The bankrupt, a merchant, being insolvent and knowing his insolvency, was sued in August, 1870, by Van Steenwyk, his banker, and by Hendrickson, his father-in-law, by the service of a summons only, in the state court, for amounts exceeding the value of his property, and shortly afterwards was sued by Levi Feigel, another creditor. No papers were filed in the cases until the day before judgments were entered, in November following. The bankrupt, after said suits were commenced against him, was applied to for payment by some of his other creditors, and he put them off, but did not inform them that he had been sued. After those creditors obtained the judgments, by default, they caused executions to be issued and levied upon all the bankrupt's property, and shut up his store, which was the first known by his other creditors of the suits. The bankrupt also represented to the attorneys of some of his

other creditors, while the suits were pending, that those creditors who had already sued him were going to give him time. After the levy the petitioning creditors commenced these proceedings in this court, alleging that he suffered his property to be taken by those creditors on legal process with a view to give them a preference. The bankrupt filed a general denial of bankruptcy, and on the trial the foregoing facts appeared in evidence, and were found by the court.

Wing & Hood, for petitioning creditors.

J. J. Cole, for bankrupt.

HOPKINS, J.: The acts of bankruptcy charged in the petition in this case are:

First—That the debtor being insolvent, with a view to give a preference to G. Van Steenwyk, of La Crosse, and Henry W. Hendrickson, his father-in-law, two of his creditors, suffered his property to be taken by them upon legal process; and,

Second—That he procured an execution to be issued upon a certain other judgment in favor of Levi Feigel, and suffered his property to be taken thereon with a view to give a preference to such judgment creditor.

The debtor denied these acts of bankruptcy, and the evidence has been taken and submitted to me with the written briefs of the attorneys for the parties.

The only question that I deem it necessary to pass upon on this hearing is as to whether the debtor "*suffered his property to be taken upon legal process*" within the meaning of section 39 of the bankrupt act, "*with intent to give a preference to one or more of his creditors.*" Under that section it is not necessary that the debtor should be an *actor* in promoting the taking; if he "suffers" the taking, he violates the act, if the necessary consequences of it are to enable the creditor to obtain a preference. If he was insolvent (which is not denied) when he was sued by Van Steenwyk and Hendrickson in August last, it became his duty to apply voluntarily for the

benefit of the bankrupt act, so that his property might be distributed equally among all his creditors, and not keep still and permit those creditors who had sued him to go on and obtain judgments and take all his property upon executions.

An insolvent debtor is not only forbidden from aiding or procuring his property to be taken upon legal process, that is, from acting with a creditor for that purpose, but he is on the contrary required to take steps to prevent it, and if, when sued, he keeps silent and does not take measures to prevent a creditor from obtaining a preference by his suit, he, within the meaning of the act, suffers it to be done.

What a party has the power to prevent, he "suffers" to be done when he does not use the means provided to prevent it. If he did not like to proceed voluntarily, he could have notified his other creditors of the fact of his having been sued. He had twenty days before judgment to do so, before judgments could have been recovered.

The debtor in this case neither did anything to prevent Van Steenwyk, Hendrickson and Feigel from obtaining judgments against him and taking his property to satisfy them, nor did he notify his other creditors of the commencement of such suits, but on the contrary, intentionally, it seems to me, concealed from them the fact of the commencement of such suits. I think in this case the testimony clearly shows that the debtor "suffered" his property to be taken upon legal process, with intent to give a preference to the execution creditors, and thereby committed the act of bankruptcy charged against him in the petition, and the adjudicated cases leave no room for doubt upon this question.[1]

The debtor, as before stated, was confessedly insolvent when sued and when his property was taken on the execution, and

[1] *In re Black and Secor*, 1 Bankrupt Register, 81; *In re Craft*, Id., 89; *In re Dibblee*, 2 do., 185; *In re Wells*, 3 do., 95; *Campbell vs. Traders' National Bank*, 2 Bissell, 423; *Beattie vs. Gardner*, 4 Bankruptcy Register, 100; *Rison vs. Knapp*, Id., 114.

he took no steps to prevent a judgment, or his property from being thus taken; he therefore suffered an act to be done which he might have prevented, which necessarily resulted in a preference in favor of the judgment creditors, and the law presumes that he intended the natural consequences of his acts. The result of his inactivity being necessarily to give a preference to the creditors suing, he is in law chargeable with having intended to effect that purpose.

I think the act of bankruptcy first charged in the petition clearly proven, and I therefore adjudge the debtor to be a bankrupt, and subject to the provisions of the bankrupt act.

It is unnecessary at this time to consider the other questions presented by the counsel.

Consult also *In re Haughton*, 1 Bankrupt Register, 121; *Wright vs. Filley*, 1 Dillon, 171; *Kohlsaat vs. Hognet*, 5 Bankruptcy Register, 159. [*Reporter.*

PUTNAM vs. HICKEY.

CIRCUIT COURT — EASTERN DISTRICT OF WISCONSIN — OCTOBER TERM, 1871.

1. The patent for bottle stopper fastener, granted to Henry W. Putnam, March 15th, 1859, and re-issued January 19th, 1864, construed and held valid.
2. Other similar inventions commented on and held not to affect it.

This was a bill filed by Henry W. Putnam for an account, and to restrain the defendant from making and selling bottle stopper fasteners claimed to be an infringement of a patent issued to complainant March 15th, 1859, surrendered January 19th, 1864, and renewed the same day as reissue No. 1606, for fourteen years from March 15th, 1859.

The facts further appear in the opinion.

George B. Goodwin, and *Thomas A. Jenckes*, for complainant.

S. W. Granger, and *Wm. P. Lynde*, for defendants.

MILLER, J.: In the schedule referred to in the letters patent, "Fastenings for bottles have heretofore been made in which a strap of metal has extended over the cork from a hinge or joint, formed on each side of the neck of the bottle by a second metallic strip." "The nature of the invention consists in forming the fastener of wire bent in such a manner that if the pressure upon the cork is sufficient to bend the wire fastener it will retain the cork more firmly, and the cork required to be pushed in before the fastener can be pushed aside, thus causing the pressure to render the fastening more secure, instead of more liable to failure."

"Joints are formed for securing the fastener, and forming a hinge upon which it may be turned aside by bending the ends

of such wires at right angles, or nearly so, to the side of the fastener. Wire is used to attach this fastener to the bottle in which the eyes are formed for receiving the ends of the fastener, and on which the fastener swings, thus producing, by one piece of wire, a much more simple, effective and cheap attachment than any before made."

The schedule further represents that the fastener is of two parts of wire. Bent wire about one-tenth of an inch in diameter embraces the stopper or cork of the bottle. The two sides are nearly straight, being curved a little in one direction, to fit the enlargement upon the neck of the bottle. The lower ends are turned outward, in this manner forming the pin for the hinge. The middle part of this wire is bent so as to stand nearly at right angles to the sides, the horizontal part being nearly parallel, and a space left between sufficient for the piston that forces the cork into the neck of the bottle, for the purpose of holding in solution the carbonic acid gas, with which the liquid is charged. In the wire that surrounds the neck of the bottle are loops, into which those ends are inserted, and which together form a hinge upon each side of the neck of the bottle, allowing the wire to be turned back, thus leaving the stopper free.

Complainant claims to secure by letters patent:

First—Forming the fastener, at the part that comes over the cork, of a piece of wire of a U form, with the ends returned and connected to the bottle, in order that the pressure on the cork or stopper may cause the fastener to hold more securely.

Second—A wire fastener for a cork or stopper, in which the ends of the wire are bent at nearly right angles, to form the joint or hinge, on which the fastener is turned.

Third—Forming the eyes for the reception of the fastener by means of a wire bent as set forth.

Fourth—A wire fastener for the stoppers of bottles, fitted so that it can be pressed aside from over the stopper, as set forth, in combination with a band or fastening attaching the same to the neck of the bottle as specified.

Defendants in their answer do not deny making, using and selling an article similar to that patented to complainant; but they deny the making, using or selling any invention for which the complainant has or has had the exclusive right or privilege to make, use or sell, or in violation of any of his rights or privileges under the said reissued letters patent, or any cork fastener containing or embodying any invention of complainant or any material part thereof.

It is alleged in the answers on information and belief, that the alleged invention was not new and original with the complainant, but that it was communicated to him and explained to him by one John Schrink, residing at Toledo, in the state of Ohio.

It is further alleged by defendants, that for an improvement similar to that claimed by complainant, letters patent were granted to one John Allender, of New London, in the state of Connecticut, July 24th, 1855, and that he and his heirs have continued ever since making and vending the articles so patented to him.

It is also alleged in the answer, that long before the patent and reissued patent to complainant, the same and each and every material part thereof was described, set forth and explained in the 2d volume of Patent Office Reports of the United States, in the year 1855, on pages 275 and 337; No. of the patent, 13,338. Also in the English Patent Reports for the year 1848; No. of the patent, 12,330, and issued to Homer Martin in said year. Also in the English Patent Reports for the year 1856; No. of the patent, 2,088, or 20,688, issued to one Chalus. Also in the English Patent Reports for the year 1857, in the patent issued as is described and set forth to James Hicks and James Tyson, January 23, 1857. Also in Rufrin's Provisional Protection English Patent; date of patent, August 1, 1855. Also in the English Patent Reports for the year 1854; No. of the patent as is described therein, 1823, and in the claim or patent issued to Henry Puncheon. Also in same reports for the year 1853, in claim or patent of Henry G. James

or Herbert James. Also in first series of French Patent Reports in patent issued to C. Goin, March 24, 1835. Also in Vol. 3, page 232, French Brevets (patent reports), for the year 1845. Also in Vol. 25, page 125, 2d series French Brevets and the plates of same in same volume, page 26, or No. 26; date of patent, October 14, 1851. Also in Vol. 20, 2d series of same work, page 208; see plates. And on these facts, so pleaded by the defendants, they allege that the letters patent to complainant are null and void.

It does not appear in evidence that John Schrink communicated to complainant sufficient facts to enable him to form a model for his invention. On the contrary, this man John Schrink is one of the witnesses to complainant's application, and complainant denies having obtained from Schrink the alleged intelligence.

There is also proof sufficient to establish the facts, that the improvement of complainant has become of general use, and that the use extends back to a short time after the date of the amended letters patent. Referring to the date of the original patent, its validity may be legally presumed.

The evidence of the witnesses, in connection with the exhibits of the patented articles annexed to bottles, I think substantially supports the schedule description of the letters patent, as claimed by complainant. It would be tedious to follow in detail the evidence in the description and explanation of complainant's improvement.

In regard to several of the patents mentioned in the answers, there is no satisfactory evidence of their construction or description. I will therefore lay aside all consideration of the patents referred to in the reports of the English patent to Howe, and the provisional protections to Hicks & Nibbs, Bufoir, Bouchman & Glover, and to James. The French patent to Adar had no provision for being swung on or off the cork, or to be used with a bottling press. The English patent to Masters and the French patent to Menage & Bougy are not wire fasteners. Their fasteners are made of iron or metal, both

in the neck band, and in the part or bale that swings over the cork. From the model I think that the fastener could not be used with a bottling press, there being no provision for receiving the plunger of the press, so that the fastener could be swung over the cork before the plunger was removed. In addition, it is made of iron, at a great expense. In the patent to Menage & Bougy there is a neck band of metal, to which hooks are attached to receive the bale, instead of eyes, and a plate rests on the top of the cork cut out on one side, from the central hole of the periphery, the central hole being for the purpose and for the size only to receive a syphon top.

The patent of Chalus comes nearer to that of complainant than any other introduced in this record. But I think there is a marked difference between them. In Chalus' patent the ears formed upon the neck wire have their planes radial with the bottle, instead of parallel with the sides of the bottle, and the hinges on the bale are formed by the loops of the wire bent round in a plain parallel to the sides of the bottle, instead of having merely short gudgeons standing radially to the bottle, and the bale of the Chalus fastener is not so formed as to take under the swell upon the neck of the bottle, as complainant's, which relieves the hinges of a great portion of the strain. There does not appear in the Chalus fastener to be any provision for its use in a bottling machine. In Chalus' fastener neither the bale wire nor the neck wire are constructed in the same way as complainant's. There are other differences between these two fasteners which I need not trace. In the use of complainant's fastener there is great saving of time, labor and expense over any of the other patents, and I think it was a patentable improvement. From as thorough examination of the proofs and exhibits as my other duties permitted, and from the arguments of the counsel, I have come to the conclusion that complainant's patent is for an improvement in the fastener of bottles, as described in his patent and schedules thereto annexed, and that the patent is valid.

The prayer of the bill will therefore be granted.

In re THE MERCHANTS INSURANCE COMPANY.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—DECEMBER TERM, 1871.

IN BANKRUPTCY.

1. A fire insurance company is clearly within the scope and provisions of the bankrupt law.

2. APPOINTMENT OF RECEIVER—ACT OF BANKRUPTCY.—The appointment by a state court of a receiver to take possession of the property and assets of the corporation is "a taking on legal process" within the meaning of the thirty-ninth section of the bankrupt act.

3. STATE PROCEEDINGS NO OBJECTION TO JURISDICTION.—It is not a valid objection to the jurisdiction of this court that the proceedings in the state court were in accordance with a general statute of the state, and part of its organic law, and that the state court had first obtained jurisdiction of the parties and subject-matter. Such a construction would effectually defeat the operation of the bankrupt law.

4. Nor is it a valid objection that the state statute under which the proceedings were instituted is not an insolvent law. If the fact of insolvency exists, and the corporation is within the provisions of the bankrupt law, this court has exclusive jurisdiction, and the fact that the state law does not purport to relieve the bankrupt from his debts, cannot be urged as a reason why the state court should hold the assets and administer the estate.

5. JURISDICTION IN BANKRUPTCY EXCLUSIVE.—Though the proceedings in the state court may have been within its powers and jurisdiction, yet when the fact of bankruptcy intervenes the exclusive jurisdiction of this court attaches.

6. INSOLVENT CORPORATION SHOULD FILE PETITION.—When the corporation found itself insolvent, it should have at once filed a voluntary petition in bankruptcy; and failure so to do, and acquiescence in the proceedings against it by the state court, is itself an act of bankruptcy.

7. PAYMENT OF GROUND RENT ACT OF BANKRUPTCY.—The payment by the corporation, when actually insolvent, of the rent necessary to preserve a valuable lease, is an act of bankruptcy; and although such payment was judicious, and made in good faith, and such an act as would have been authorized by this court, these facts do not change the character of the act under the law.

The petitioning creditor in this case, The Singer Manufacturing Company, filed a petition in bankruptcy against the Merchants Insurance Company, on an indebtedness upon a policy of insurance issued by the latter company, upon which loss was sustained on the 9th of October, 1871, and the chief act of bankruptcy alleged is that said insurance company, being insolvent, did on the 6th day of November, 1871, suffer its property to be taken on legal process, under certain proceedings instituted by the Attorney General of Illinois, in the Circuit Court of Cook county, pursuant to the twenty-third section of the statute of that state approved March 11th, 1869, entitled, "An act to incorporate and govern fire and marine insurance companies, etc."

The answer of the insurance company admitted the substantial facts alleged in the petition, and submitted to the court whether those facts constitute an act of bankruptcy within the meaning of the law.

Eldridge & Tourtellotte, for petitioner.

McCagg, Fuller & Culver, for respondent.

BLODGETT, J.—The respondent is a corporation, created under a special charter granted by the legislature of Illinois in 1861, and since 1863 up to about the 6th of November last, said company has been engaged in doing a fire and marine insurance business, pursuant to the powers granted in its act of incorporation, having its principal office in the city of Chicago. By reason of the losses sustained by said company from the great fire which occurred in this city on the 9th of October last, said company became insolvent, and on the 31st of October last the people of the state of Illinois, by the Attorney General of the state, filed their bill of complaint in the Circuit Court of Cook county, pursuant to the 23d section of the general insurance law of this state, alleging in substance that said company had become insolvent and unable to pay its liabilities, and that its assets were insufficient to justify the con-

tinuance of said company in business, and praying that said corporation might be dissolved, and that a receiver be appointed to take charge of its assets; and on the 6th of November last the officers of said company, fearing that judgments might be obtained in certain suits then pending against the company, and the plaintiffs in such suits thereby obtain an undue preference over other creditors, consented to the appointment of a receiver by said court in accordance with said bill, and W. E. Doggett, Esq., was accordingly appointed such receiver, and the company has since delivered over to him all its assets and property. No charge of willful or intended fraud is brought against the corporation or its officers, it being conceded that its officers and managers are among the most upright and capable of our citizens, and that the present insolvency of the company results from circumstances beyond the control of those in charge of its affairs.

Upon these admitted facts we are called upon to adjudicate. There can be no doubt, or at least we have none, that this corporation is one of that class of corporations intended to be within the scope and provisions of the general bankrupt law. The 37th section declares that "*the provisions of this act shall apply to all moneyed business or commercial corporations and joint stock companies.*" The business of insurance, for the carrying on of which this company was incorporated and in which it has been engaged, is clearly included within the definitions given by the statute.

The object and intent of the General Bankrupt Law is to place the administration of the affairs of insolvent persons and corporations *exclusively* under the jurisdiction of the Federal courts sitting as courts of bankruptcy; and the enactment of the General Bankrupt Law now in force suspended all actions and proceedings under state insolvent laws.[1]

[1] *Commonwealth vs. O'Hara*, 15 American Law Register, 765; *Perry vs. Langley*, 1 Bankrupt Register, 155; *Van Nostrand vs. Barr*, 2 do., 154; *Martin vs. Berry*, Id., 187.

It also seems clear to us that the appointment of a receiver by the state court to take possession of the property and assets of the person, firm, or corporation, and apply the same to the payment of debts, is a "taking on legal process," within the meaning of the 8th clause of the 39th section of the bankrupt act. The receiver of a court of chancery is its executive officer, as much so, to all intents and purposes, as a sheriff of a court of law; and the goods or property in his hands are as much in the custody of the law as if levied upon under an execution or attachment. Indeed, the purpose for which the receiver in this case takes the property is the same as that of a sheriff in making his levy, except that the scope of the receiver's warrant is more comprehensive, he being required to pay *all debts*, while the sheriff only seeks the payment of the specific debt mentioned in his execution or attachment.

Although I am not aware that this particular point has ever before been raised in this court, it has often been decided elsewhere.

But it is objected that the proceedings in the state court here complained of being in accordance with a general statute of this state and part of the organic law by which the respondent exists, and being predicated mainly upon the reserved right of the state to protect its citizens against irresponsible insurance companies, and the state court having acquired jurisdiction of the parties and subject-matter, this court cannot now interfere as a bankrupt court and take charge of and administer the assets in question, although the insolvency of the respondent is fully conceded.

It seems enough to suggest, in answer to this position, that if correct, any state could effectually defeat the operation of any bankrupt law passed by Congress by simply providing that any person or corporation, if deemed insolvent or incapable of doing business by a state officer, might, under the power of exercising and enforcing police regulations or enactments by the states, be wound up, and its assets administered upon, in the state courts, notwithstanding such person or

corporation might be insolvent and guilty of all the acts of bankruptcy provided for in the General Bankrupt Law.

It is further urged that the proceeding in question does not come within the terms of the bankrupt act, because the state law under which it is instituted is not an insolvent law inasmuch as it does not purport to discharge the debtor from its liabilities; but we fail to perceive how the treatment the debtor may receive at the hands of the state court can avail to sustain that court's control over the assets. If the *fact* of insolvency exists and the person or corporation is within the provisions of the bankrupt law, the federal courts sitting in bankruptcy have *exclusive* jurisdiction of his property, and the fact that a state law does not purport or attempt to relieve the debtor from his debts cannot, it seems to us, be urged as a reason why the state court should hold the assets and administer them after proper proceedings in bankruptcy have been instituted in the federal courts.

We might further answer this objection by the suggestion that a discharge of an insurance company's liabilities under this state statute and proceedings in the state courts would be, in the nature of things, superfluous and unnecessary, for the reason that the main object of the proceeding is to forfeit the charter and franchises of the corporation, and why assume to discharge from further liability a debtor whose legal entity is to be dissolved? If its corporate existence is to be terminated it matters little what becomes of its unpaid balances.

It also seems clear to us that in so far as a state law attempts to administer on the effects of an insolvent debtor and distribute them among creditors, it is to all intents and purposes an insolvent law, although it may not authorize a discharge of the debtor from further liability on its debts.

We have no doubt that the proceeding in the state court to forfeit the charter and corporate franchises of this company is entirely valid and within the powers and jurisdiction of that court, perhaps exclusively so. The state having created the

corporation may undoubtedly dissolve it in its own way, consistent with the terms of the grant.

The fallacy of the respondent's argument seems to us to consist in the assumption that because the state court had jurisdiction for the dissolution of the corporation, it can therefore hold jurisdiction under all circumstances for the distribution of the assets. If the fact of insolvency had not existed, and no act of bankruptcy had been committed, the state court would probably have had the right to administer the assets if once within its control, as an incident to the principal object to the proceeding which was the dissolution of the corporation. But, as before stated, when insolvency, or other facts, intervene so as to make the debtor a proper subject for the operation of the bankrupt act, the exclusive jurisdiction of the bankrupt court attaches, and the state court and those acting under its mandate must surrender the control of the assets, whatever may be the final decree in regard to the continuance of the corporation. When the corporation found itself insolvent, or was certified to be insolvent by the state auditor, acting under the state law, and proceedings were instituted for the dissolution of the corporation and the administration of its assets, it was the duty of the corporation at once to voluntarily file its petition to be adjudged a bankrupt in the federal court, and its failure to do so, and its acquiescence in the proceedings by which its assets were placed under the control of the state court, is in itself an act of bankruptcy.

This is not a case of concurrent jurisdiction between the state and federal courts. In all cases where the state and federal courts have concurrent jurisdiction, the court which first obtains control of the parties and property by judicial proceedings will retain it, and the authorities cited by the counsel from the 8 Howard, and later cases, are full in point, but we conceive they do not apply to this case, inasmuch as this court has *exclusive* jurisdiction in cases of bankruptcy. In our view, then, the admitted facts show the respondent guilty of the act of bankruptcy charged in the petition, and

nothing in the proceedings had before the state court tends to oust this court of its jurisdiction and authority to adjudicate the respondent a bankrupt.

The precise steps by which the officers of this court shall hereafter obtain possession of the assets of the bankrupt need not now be indicated, as the action of this court in that regard will be governed by circumstances as they may hereafter arise.

In thus announcing our conclusions, we do not consider that we are adopting any new rule, or making even a new application of an old one, as the pathway we are treading appears to us to be well beaten by precedents and authority. Nor should we have taken pains to so fully state our views but for the fact that the overwhelming calamity which befel this city on the 9th of October last, brought financial ruin upon a large number of insurance companies doing business here, and makes it seem desirable that a tolerably full exposition should be given of the law governing the rights and duties of insurers and insured.

It is also proper to add that the petition in this case charges a further act of bankruptcy—in that said insurance company, on or about the 31st day of October last, being then insolvent, paid one of its creditors in full, thereby giving such creditor a preference over other creditors. And it is admitted in the answer that after the company became insolvent a large sum of money fell due one Tuthill King for rent of the lot on which the company had erected a valuable building; and as this lease was deemed a valuable asset, and would be forfeited unless the rent was paid at maturity, the company paid the same, deeming that it was thereby subserving the best interests of its creditors.

We have no doubt but what the admitted facts applicable to this charge make out a technical act of bankruptcy. But no stress was laid upon it in the argument, as all parties seemed desirous of a decision upon the other charges.

The expenditure complained of seems to have been judicious and made in good faith, and this court would probably, on the

facts stated, have authorized it, but this does not change the character of the act under the law.

It was undoubtedly a preference, and as such, a technical act of bankruptcy. An order of adjudication will be entered as prayed in the petition.

DRUMMOND, J., concurring.

Suffering property to be taken under an order of the state court, appointing a receiver in an action instituted by the Attorney General of the state to dissolve the corporation, is an act of bankruptcy. *In re Washington Marine Insurance Co.*, 2 Benedict, 292. [*Reporter.*

In re KAHLEY.

DISTRICT COURT—WESTERN DISTRICT OF WISCONSIN—JANUARY, 1872.

IN BANKRUPTCY.

1. FIFTY PER CENT. CLAUSE.—Since the amendment of July 27, 1868, a bankrupt is entitled to his discharge, without the assent of his creditors, if his gross assets equal 50 per cent. of the debts proved, without deducting costs or expenses.

2. The intention of Congress in making this amendment clearly was to make the term assets as comprehensive as estate, and relieve the debtor from the costs and expenses of the proceedings.

3. Several cases commented on and criticised.

Application by Joseph Kahley, one of the bankrupts, for a discharge.

In this case the assignee received from the estate of the bankrupts a sum exceeding fifty per centum of the debts proven, without deducting the costs and expenses of the pro-

ceedings, but after paying the costs and expenses it did not equal fifty per centum of the debts. The debts were all contracted since the 1st of January, 1869. The applicant, in his petition, claimed that he was entitled to his discharge without the assent of his creditors, as the amount of his assets received by the assignee exceeded fifty per centum of the claims proven. The creditors had filed no formal opposition to a discharge, and did not appear in opposition to the application.

I. C. Sloan, for petitioner.

HOPKINS, J.—The determination of the question involves a construction of section 33 of the bankrupt act as amended by the act of July 27, 1868.

The counsel for the bankrupt contends that in all cases where the value of the assets "equals fifty per centum of the debts proven," a discharge should be granted as a matter of right.

On the presentation of the question to me, I thought it quite plain that such was the meaning, but upon an examination of the authorities I found it not quite so clear as I first thought.

I found that Judge NELSON, *In re Freiderick*, 3 Bankruptcy Register, 117, and *In re Graham*, 5 do., 155, had held that the term "assets" in the 33d section of the bankrupt act, meant "the proceeds of the debtor's property which are applicable to the payment of his debts," and that Judge BLATCHFORD, *In re Webb & Taylor*, 3 Bankruptcy Register, 177, had concurred with Judge NELSON'S opinions, and said "that the proceeds of the bankrupt's property in the hands of the assignee subject to be divided among the creditors at the time of the hearing of the application for discharge, must be equal to fifty per centum of the debts proven."

These authorities being at variance with my first impression of the meaning of the section as amended, I have given the subject a more thorough consideration than I had first thought it required.

I dislike to differ from those eminent jurists, each of whom has done so much toward elucidating the bankrupt act, and in giving to it a harmonious and efficient operation. I should ordinarily do so with a good deal of distrust and hesitation, but upon the question now under consideration, I do not feel much embarrassment, for, to me, it seems exceedingly clear, although at variance with their views.

In *In re Freiderick* this question was not, it seems to me, fairly before the court or necessary to be decided, and the decision may therefore be considered as *obiter*. That was a case of voluntary bankruptcy "and the bankrupt, before any debts were proven or assignee appointed, petitioned to have his assets appraised to show that they exceeded fifty per cent. of his provable debts. The judge denied the application as no debts had been proven or assignee appointed. The application was clearly premature, and what the judge said upon the construction of section 33, seems to me to have been unnecessary, and, therefore not binding authority. And in *In re Graham* the court had ordered certain property subject to a lien to be sold, *discharged* therefrom, and that the lien be transferred to the fund in court. The surplus of the proceeds, after paying off that lien, did not reach the required amount, and the question before the court was as to whether the amount of the fund applied in discharge of the lien was to be reckoned as a part of the "assets" in determining whether they equalled fifty per cent., and the court decided that it could not be, which disposed of that case, so the portion of his opinion affirming his views in *In re Freiderick*, as to the meaning of section 33, was not strictly necessary. In the report of the case *In re Webb & Taylor*, the facts are not stated, but from the opinion I should infer that the question was fairly before the court. Judge BLATCHFORD does not argue the question or present any reasons for his opinion, but simply states his conclusions.

In order to determine the question, it becomes necessary to examine the history of the legislation upon the subject. Section 33, as originally adopted, declared that "no discharge

shall be granted to a debtor whose assets do not *pay* fifty per centum of the claims against his estate, unless," etc. That clearly meant the proceeds of the bankrupt's property applicable to the payment of the proven claims. In other words, *net assets*. The ordinary definition of the term "assets" was qualified and limited by other parts of the sentence as much as if the word "net" had been placed before it.

But Congress by the act of July 27, 1868, amended that clause so as to make it read "no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proven," etc.[1] The Judge says, in *In re Freiderick*, "the amendment of July, 1868, although more favorable to the bankrupt, has not changed the meaning of the word 'assets' in the section," and that as the section now stands it must be construed as if it read "*the proceeds of the bankrupt's property in the hands of the assignee, and subject to be divided among his creditors must be equal*," etc. To such construction I cannot yield my assent. I think before the amendment it was qualified by the context so that it meant *net assets* as before stated. But I think the amendment was adopted for the purpose of removing that restriction, and that it should now receive its ordinary signification, which is as comprehensive as "estate" or "effects." We must presume that Congress meant to make some change in favor of the bankrupt if the amendment was made in his interest, as is admitted by the learned Judge in *In re Freiderick*. But if they did not give him a right to a discharge based upon the gross value of his assets, then they certainly did not improve his condition at all, for before he was entitled to a discharge upon *paying* fifty per centum, and if he is not entitled to a discharge now unless "*he has in the hands of the assignee*" fifty per centum to pay upon his debts, the only change made by it was that before the amendment he would have to see that it was *actually* paid over, while under the amendment he must

[1] 15 U. S. Statutes at Large, 228.

see that it is in the *hands of his assignee ready to pay over.* Certainly such could not have been the meaning of Congress in adopting the amendment, and such a construction effectually deprives him of any substantial benefit or advantage conferred upon him or intended to have been given him by the amendment.

The clear intention of the amendment, to my mind, was to relieve the bankrupt of the costs and expenses of the proceedings. If the estate realized a sum equal to fifty per cent., he should be discharged, whether it went to the payment of costs and expenses or to the creditors. The costs and expenses are often, as in this case, largely increased by litigation between the creditors and by suits brought by the assignee, over which the bankrupt had no control, and if the creditors are willing to waste the estate, or permit the assignee, who is their trustee, to do so in expensive litigation, they should be responsible for the consequences to that extent, that such costs should not be deducted from the proceeds of the bankrupt's estate in determining the amount his assets would pay if applied solely to the payment of his debts.

It seems to me that the ordinary meaning of the word "assets" comprises the whole of a decedent's or insolvent's estate, unless limited by some qualifying word or expression.

I think, as used in the section as amended, it must receive its ordinary signification, and be held to include *all* the estate of the bankrupt, not that only which is applicable to the payment of debts, but that applicable to the payment of costs and expenses as well. In section 47 it is certainly so used. It is there stated "that if sufficient *assets* for the payment of fees," etc., showing that it may be used, and is used, in the act as meaning the "estate" applicable alike to the payment of debts and expenses. I cannot find any authority in the act, or any sufficient reason outside of it, for giving to it a more limited signification in that section than in the others where it is used. The word "estate" is used to express a like purpose in section 30, and the Supreme Court of the United States has construed

"*no assets*" in the 29th section as meaning that the assignee "has not received or paid out any money on account of the estate." (See form 35.) The converse of the proposition would be, that if he had received or paid out money on account of the estate, he had received assets.

Again, the amount to be divided among creditors in section 28, is called "estate and effects." I therefore think the words "estate," "estate and effects," and "assets" are used synonymously in the act. The term "assets" in that section, as amended, is not, in my opinion, used to express the *net balance* to be distributed among the creditors, as held by the judges in the cases referred to. But, on the contrary, it means the *entire estate* of the bankrupt, irrespective of the use to which it may be appropriated by the court; and as the assets of the bankrupts in this case exceeded fifty per centum of the debts proven, the bankrupt is entitled to his discharge without the assent of his creditors; and in determining the question as to whether the assets do amount to such sum, the cost and expenses of the proceedings are not first to be deducted. I am aware that in the administration of the bankruptcy act, the district courts occasionally differ as to the true meaning of some of its provisions. Such differences, I think, ought, as far as possible, to be avoided, for the good of the profession as well as of the parties, and I have, on questions of practice not involving any substantial right or principle, often yielded my opinion for the sake of conformity, but I cannot allow the convenience or advantages of conformity to control me when to do so would deprive a party of a valuable right secured to him by the act.

The discharge will be granted.

In a recent case in the district of Rhode Island, *In re Vinton*, reported in 7 Bankruptcy Register, 138, KNOWLES, J., declines to adopt the reasoning and rule as here presented, and follows the authority of Judges NELSON and BLATCHFORD in the cases above cited.

Consult also *In re Lincoln & Cherry*, 7 Bankruptcy Register, 334, in which case it is held that the bankrupt should receive his discharge, he

not being responsible for any loss or mismanagement of the estate, and having no control over it.

The rule in the Northern District of Illinois is the same as contended for by Judge GRESHAM; *In re Thompson*, Vol. 2 of this Series, p. 481.

In *In re Van Riper*, 6 Bankruptcy Register, 573, it was held that although the bankrupt's assets, at the time they passed into the hands of the assignee, were worth more than fifty per cent. of the claims against his estate, yet as they did not realize in gross fifty per cent., the bankrupt could not be discharged except as to debts contracted prior to January 1, 1869.

Consult also *In re Shower*, 6 do., 586. [*Reporter*.

In re THE SANDS ALE BREWING COMPANY.

DISTRICT COURT — NORTHERN DISTRICT OF ILLINOIS — JANUARY, 1872.

IN BANKRUPTCY.

1. COVENANT TO INSURE.—A covenant in a mortgage to keep the mortgaged premises insured for the benefit of the mortgagee creates a specific equitable lien upon the insurance money, which is valid as against an assignee in bankruptcy.

2. The mortgage being recorded, the covenant acts upon the insurance as soon as effected, runs with the land, and is notice to creditors; and no subsequent assignment can affect the rights of the mortgagee. It is not necessary that the policies be specifically assigned, nor that the mortgagee select the companies. And any acts of the morgagor without the consent of the mortgagee will not defeat the effect of the covenant.

3. *It seems*, that not even a specific assignment to a particular creditor would have avoided the effect of the covenant.

4. Where such covenant is made by a corporation, no subsequent change in the ownership of the stock can change its legal effect.

This was a petition by Francis B. Peabody as trustee, for an order on the assignee of the bankrupt to pay over to the peti-

tioner the proceeds of certain policies of insurance. The bankrupt, a corporation created and existing under the general law of Illinois, on the first day of January, 1868, then being solvent, borrowed, through the petitioner, the sum of $60,000, and to secure the payment thereof executed to him, as trustee, its trust deed bearing date that day, thereby conveying to him as trustee certain lots and parcels of land on which were situate the brewery and buildings occupied and used by the bankrupt for the purposes of its business. This deed contained, among other covenants, the following:

And the said Sands Ale Brewing Company, for itself and its successors and assigns, does covenant, grant and agree to and with the said party of the second part, and his successors in trust, that it will well and truly pay the said principal sum of money, and interest thereon, mentioned in said principal note, according to the tenor and effect thereof, and will not at any time hereafter, until the said principal sum and the interest thereon shall be fully paid, suffer said premises, or any part thereof, to be sold for any tax or assessment whatsoever, nor do, nor permit to be done, to, in, upon, or about said premises, anything that may in anywise tend to impair the value thereof, or to weaken, diminish or impair the securities intended to be effected under and by virtue of this instrument.

And further, that the said Sands Ale Brewing Company, its successors and assigns, shall and will, at all times hereafter, until said principal sum of money, and all arrearages of interest thereon, shall be fully paid, keep all the buildings, outhouses excepted, now situate, or that may hereafter be erected upon said premises, fully insured against loss or damage by fire, in some good and responsible insurance company or companies, (the selection of such insurance company or companies to be left to the option of the said party of the second part, or its successors in trust,) in the fair insurable value of such buildings, and cause such insurance to be made payable, in case of loss, to the said party of the second part, or his successors in trust, and deliver to him or them, each, all and every, the policies of insurance therefor, as soon as and whenever such insurance shall be effected, and all renewal certificates of such policies; * * * * * * and the said party of the second part, or his successors in trust, shall hold each and all such policies of insurance as collateral and additional security for said principal sum of money and interest, and shall have the right to collect and receive any and all money and sums of money that may at any time become collectible or receivable upon each, all and every of such policies of insurance by reason of the damage or destruction of such buildings by fire, and apply the same, when received, in the same man-

ner, as far as possible, as is hereinbefore provided for in case of a sale of said above described premises under the power of sale hereinbefore contained; or, if the legal holder of said principal note so elects, shall disburse the same in the repair or rebuilding of such buildings. * * *

A re-conveyance of said premises shall be made by the party of the second part, or his successors in trust, to said party of the first part, its successors or assigns, at its expense, on full payment of the indebtedness aforesaid,and performance of the covenants and agreements made herein by the party of the first part.

Soon after the execution of this deed, and in compliance with this covenant, the bankrupt caused insurance policies on the property to be taken out and assigned to the trustee, and when these policies expired, which was in December, 1868, new policies were taken out, but not assigned or made payable to the trustee, and although policies to a large amount were taken out each succeeding year, they were not assigned or made payable to the trustee, except as to a part of them during the second year. On the 9th of October, 1871, the buildings and improvements on said premises were destroyed by fire, the bankrupt at that time holding policies of insurance to the amount of about $120,000 on the buildings and personal property situate therein; the total value of the buildings being about $200,000. The interest on the debt of $60,000, secured by the deed of trust, had been regularly paid as it fell due, but no part of the principal sum. Up to the time of the fire the corporation was solvent, but soon afterwards it filed a petition in bankruptcy in this district, was duly adjudicated a bankrupt, and the assignee had collected a portion of the money on the insurance policies.

The real estate, after the destruction of the buildings, was not adequate security for the amount of the loan.

Paddock & Ide, and *Samuel W. Fuller*, for petitioner.

M. W. Fuller, and *J. N. Jewett*, for assignee.

BLODGETT, J.: The petitioner claims that the covenant in the trust deed gives him an equitable lien upon the proceeds

of the insurance to the exclusion of the general creditors, while on the part of the assignee and the general creditors it is insisted that the policies in question, not having been assigned to the trustee, nor made specifically payable to him in case of loss, he has no higher right to them than the other creditors, and that the fund, therefore, belongs to the assignee. The bankrupt being a corporation, I do not conceive that any changes which may have taken place in the ownership of its stock since the trust deed was given can affect the question at issue. No matter who buys or sells the stock, or who holds the offices or manages its affairs, the corporate entity remains the same. Its covenant to insure is binding on all stockholders and officers, and all persons in privity with it, and, being on record, is notice to all its creditors. The assignee can hold nothing in this case which the grantor in the trust deed could not have held if bankruptcy had not intervened. His relation is purely representative. Creditors who have trusted the bankrupt must be held to have done so with full notice of the covenant to insure, and of the legal and equitable effect of that covenant. The covenant to insure runs with the land, as much so as a covenant to repair, or rebuild, or for another term, because it is a charge upon the land.[1]

What then was the effect of that covenant, so far as the right to this insurance money is concerned?

The bankrupt covenanted to insure to the fair insurable value of the buildings, and to cause the insurance to be made payable, in case of loss, to the petitioner or his successors in the trust. The insurance was effected, but not assigned, nor made payable to the trustee. Can this make any difference? This court must be governed in disposing of this question by substantially the same rules as a court of equity. In 2d Parsons on Contracts, 440, it is said: "There is authority, strength-

[1] *Vernon vs. Smith*, 5 Barnewell & Alderson, 13; 1 Washburne on Real Property, 426; 4 Kent's Commentaries, 558; *Spencer's Case*, 1 Smith's Leading Cases 137.

ened, as we think, by reason, that when a mortgagor is bound by the mortgage contract to keep the premises insured for the benefit of the mortgagee, and does, in fact, keep them insured by a policy which contains no statement that the mortgagee has any interest therein, the mortgagee, nevertheless, has an equitable interest in and a lien upon the proceeds of the policy which a court of equity will enforce for his benefit." See also to same point, *Thomas vs. Van Kaff*, 6 Gill and Johnson, 372; *Carter vs. Rockett*, 8 Paige, 436; *Lazarus vs. Commonwealth Insurance Company*, 2 American Leading Cases, 834; *Nichols vs. Baxter*, 5 Rhode Island, 491; *Norwich Fire Insurance Company vs. Boomer*, 52 Illinois, 446; *Providence County Bank vs. Benson*, 24 Pickering, 210; *Miltenberger vs. Beacom*, 9 Pennsylvania State, R. 198; *King vs. Insurance Co.*, 7 Cushing, 1; Flanders on Fire Insurance, 367.

The principle announced in all these cases is but a practical application of the maxim that equity will consider as done what the parties have covenanted to do. But it is objected that the mortgagee, under this covenant, must first select or indicate the companies in which he wishes the insurance effected, before the covenant becomes binding or effective to vest any right in him to the proceeds of the insurance. It would seem a sufficient answer to this objection, that the covenant being to insure to the full insurable value for the benefit of the mortgagee in this case, and the insurance having been effected, it does not lie in the mouth of the mortgagor to say that the mortgagee shall not have the benefit of it because he has acted without the selection or contrary to the selection of the mortgagee. Suppose the mortgagee had selected the companies, and notified the mortgagor, and the latter, in disregard of the selection, had effected insurance in other companies, could such violation of his contract devest the mortgagee of his rights? I think not. But the mortgagor, having effected insurance to nearly, if not quite, the insurable value of the property, has put it out of the mortgagee's power to further insure, because the property can only carry a limited amount. And, therefore, the

mortgagee must hold what has been effected, or none. But there seems another answer to this point, arising from the facts in this case. Insurance was effected and assigned, in compliance with the covenant, the first year, and perhaps the second. Was not this a sufficient selection, and was it not the duty of the mortgagor to renew the policies thus effected until notified otherwise by the mortgagee, and if the underwriters have since been changed by the mortgagor, without the mortgagee's consent, this act of the mortgagor cannot be pleaded in equity to defeat the effect of his covenant.

My conclusion then is, that the covenant by the bankrupt to insure operated to assign in equity to the petitioner the benefit of any insurance effected by the bankrupt on the mortgaged property. It is no answer to say that the mortgagee might have insured in default of insurance by the mortgagor, because the mortgagor had insured, and his insurance inured at once to the benefit of the mortgagee. It is urged by way of argument in behalf of one creditor—the Union National Bank—that if all or part of these policies had been assigned to that creditor, it could have been held then as against the petitioner, and that the assignee, holding for the benefit of all creditors, occupies the same position; but this argument is fallacious, because it overlooks or ignores the fact that all creditors had notice of the petitioner's equitable right to this insurance money, and could acquire no valid interest therein as against him. Equity made the assignment the moment the insurance was effected, if the mortgagor did not do it. It is true courts in this country and in England have said that all general liens infringe upon the bankrupt laws, the object of which is to distribute the bankrupt's estate equally, and *that equality is equity*. But if any one point is carefully guarded by the bankrupt law now in force, it is the protection of all fairly obtained liens, whether legal or equitable in their origin. The authorities quoted, and many others I have consulted in the examination of this case, leave no doubt in regard to the effect to be given this covenant. The lien is neither doubtful or general, but is

clear and specific. It is but carrying out the intent of the parties, and giving the mortgagee the security he had bargained for, and which he had given the whole world notice he was entitled to.

The assignee will, therefore, pay to the petitioner the insurance money collected by him on these policies.

Where the assured has agreed to insure for the protection of another person having an interest in the property insured, such person has an equitable lien in case of loss upon the money due upon the policy. *Ellis vs. Kreutzinger*, 27 Missouri, 311; approved by the New York Court of Appeals, in *Cromwell vs. Brooklyn Fire Insurance Company*, 44 New York, 42, where it is also held that the insurer, having notice of the assignment of a contract providing for such insurance, is liable to the assignee, even though it has actually paid the insurance money to the original vendee. [*Reporter.*

In re STRACHAN.

District Court—Western District of Wisconsin—January Term, 1872.

In Bankruptcy.

PURCHASER OF CLAIMS.

1. When May Prove.—A party who in good faith purchases claims against a bankrupt with the intention of stopping proceedings and giving him time, should not be deprived of participation in the estate.

2. To enable him to prove them, however, he should take an assignment. A simple receipt of payment is not sufficient.

3. Date of Proof—Interest.—Such claims should be proven as of date of adjudication, but may draw interest to date of actual payment.

4. EFFORTS OF DEBTOR TO EXTRICATE HIMSELF.—The Bankrupt Act should not be so strictly construed as to prevent a debtor from making every effort to extricate himself from bankruptcy proceedings.

5. *The forms*, prescribed in the General Rules are not binding, but may be altered to suit circumstances.

Objection by creditors to proof of debt by William T. Henry, against the estate, certified to the court by the register.

The facts are fully stated in the opinion.

J. M. Smith, for Mr. Henry.

E. P. Weber, for opposing creditors.

HOPKINS, J.: The fact that the bankrupt owed the debts sought to be proven, is not disputed, and if it were, the proof is sufficient to satisfy me that he did owe them at the time of the commencement of the bankruptcy proceedings against him.

The main objection urged to the allowance of the claims is, that they were bought by him after the filing of the petition in bankruptcy, and such is the fact, except as to an accommodation acceptance of $3,000 which was given before that time.

At the time of filing the petition a very large proportion of the bankrupt's indebtedness was evidenced by promissory notes and bills of exchange, all of which, so far as known, were purchased by Mr. Henry before the adjudication.

After the proceedings were commenced, he says he thought that, if they could be discontinued, the bankrupt could pay all his debts and have something left; but, if forced through bankruptcy, his estate would not pay all; that, acting upon that hypothesis, he undertook to buy up all the debts at eighty cents on the dollar, and end the proceedings; that after buying up over $50,000 worth (being all the undisputed claims,) he found some which were not acknowledged as just by the bankrupt, and which the parties being unable to adjust satisfactorily, prevented him from carrying out his purpose. Thereupon he decided to let the proceedings go on, and Mr. Strachan

was accordingly by default, on the 20th day of May, 1871, adjudged a bankrupt.

The parties representing such disputed claims (which are still in progress of trial and not yet allowed) object to Mr. Henry's being allowed to prove his claims, because he bought them after the filing of petition in bankruptcy. He owns all the claims against the bankrupt except the claims of the parties opposing his right to prove.

The testimony satisfies me that he, in good faith, undertook to buy up all the claims against the bankrupt with the intention of stopping these proceedings and giving him time to pay them, and was only prevented from doing so by the presentation of some claims that were disputed by the bankrupt, and not being able to settle and purchase those, the continuance of the proceedings already pending, or the commencement of new ones, he thought, was unavoidable. I do not see that in so doing he violated any of the provisions of the bankrupt act, nor did he interfere with the rights of the creditors whose claims he did not buy, nor did his acts in any manner affect injuriously their rights in the bankruptcy proceedings.

I do not think the act should be construed so strictly as to prevent the bankrupt from making any effort to extricate himself from the bankruptcy proceedings, and if he can find a friend to buy up his debts, for the purpose of giving him time to convert his property into money to pay them, I think he should be allowed to do so. I do not think a person who honestly undertakes to purchase up the debts for such purpose, after he has purchased the principal part, as in this case, and then fails because some party presents a claim which is denied by the bankrupt, should be deprived of the right of participation in the estate of the bankrupt. The act does not require any such construction, and certainly the general interest of both debtor and creditor is opposed to any such interpretation.

The bankrupt act encourages all honest efforts of a debtor to pay his debts, and to give it any other construction would

be to condemn the whole act as false and oppressive in theory and fact.

The clause in the twenty-second section, which provides that the creditor must prove "that the claim was not procured for the purpose of influencing the proceedings under this act," I was at first inclined to think prohibited the transfer of claims altogether after the commencement of proceedings, but upon further reflection I concluded that it did not relate to transfers after the filing of petition any more than before, and that it was not intended to interfere with ordinary transfers, but only such as were procured for the purpose of influencing the proceedings in bankruptcy.

And as the testimony fails to show that Henry procured these for any such purpose, I think his purchase is good.

The argument drawn from the Form of proof, No. 22, I do not regard as of much force. Those "forms" are not prescribed in the act, and general rule 33 declares that the "forms" annexed "shall be observed and used with such alterations as may be necessary to suit the circumstances of any particular case."

It does not, therefore, follow, by any means, that if a creditor cannot make that particular deposition, that his claim is to be rejected. The "forms" may be altered to suit circumstances.

As the bankrupt owed these debts at the time of filing the petition, they were provable under the act (section 19) and will, therefore, be barred by his discharge.

Now, if no party can prove them by reason of such change of ownership, then they will be wiped out without any part being paid. I cannot yield my assent to such a construction of the bankrupt act in cases where the claims, as in this case, were bought in good faith.

I therefore hold that Mr. Henry, as the owner and holder of these notes and bills of exchange, may prove them as against the bankrupt's estate, notwithstanding he purchased them after the commencement of the bankruptcy proceedings.

I find that a like view has been taken of the act in *In re Murdock*, 3 Bankrupt Register, 36; *In re Fortune*, 3 Bankrupt Register, 83; and in *In re Frank*, 5 Bankrupt Register, 194.

But this question is not raised for the first time under the present bankrupt act. It was presented under the act of 1800, and Justice WASHINGTON, in *Humphries vs. Blight's Assignees*, 4 Dallas, 370, in deciding it says: "We have no doubt upon the right of the assignee of the note in this case, to prove the debt under the commission, and to receive a dividend. The certificate of the bankrupt would be a bar to a recovery in an action by the present holder of the note against him. And wherein a certificate will be a bar, the right to prove the debt under the commission must be unquestionable."

The transfer of the note in that case was after the commission of bankruptcy had issued; after the proceedings were commenced, as in this case.

That case came before the court again, 1 Washington, C. C. R.. 44, and the same learned judge said: "It would be unreasonable that such an assignee should not be allowed to prove, under the commission, since the debt would most certainly be barred by the certificate, being a debt due at the time of the bankruptcy, and such an one as might have been proven under the commission. It can produce injury to *no person*, as it can make no difference to the assignees whether the debt be proved as due to A, or to his assignee; and as they ought not to be injured, so they ought not to derive a benefit from this change, not of the debt, but of the creditor."

The act of 1867 provides, it is true, that a party shall forfeit his right to prove a debt, when he acts in violation of its provisions, but I have found in this case that Mr. Henry did not so purchase these claims, which brings this case within the rule laid down by the eminent judge who decided that case.

And that reasoning applies with equal force to a case arising under the act of 1867 as under the act of 1800. So that, following that decision as authority, it settles the questions

involved here in favor of Mr. Henry's right to prove, and be allowed the amount of the notes and drafts, although purchased after the filing of the petition in bankruptcy.

But I do not think the accounts that he claims to own and prove are assigned to him in a way to entitle him to prove them. He has no assignment of them, simply a *receipt* of *payment*, and if that was the transaction he might have a claim for money paid as against Strachan, but that cause of action would not accrue until the payment, which was after the commencement of bankruptcy proceedings, which would not be a debt provable under the act, nor be affected by the discharge.

This view excludes the account of M. E. Fuller & Co., $652.33; of Nichols, Shepherd & Co., $366.96; and that of E. P. Dickey, $91.53. The drafts of bankrupt drawn upon Henry in favor of Boal, Andrews & Cook, for $34.05, dated April 25, 1871, and in favor of Johnson, Murphy & Co., for $1,500, dated May 19, 1871, and accepted and paid by him, are not provable, as they were drawn and paid after the commencement of bankruptcy proceedings.

The bankrupt's liability to Henry arose upon his acceptance and payment of the drafts, and Mr. Henry is not, as the proof now stands, entitled to be subrogated to the rights of the creditors to whom the drafts were given. If he intended to have been, he should have taken an assignment of their claims.

The counsel for the opposing creditors contends that the debts should be proven as of the date of the adjudication; I am inclined to adopt that as the proper construction of the 19th section of the bankrupt act.

But the claims will, of course, draw interest, since then and up to the payment, at the agreed rates, where it was agreed upon, and when not, at the legal rate.

I therefore find and adjudge that there was due from the bankrupt to William T. Henry, on the 20th day of May, 1871, the day of the adjudication, the sum of $72,507.95, and order and direct the register to enter him in his minutes and list of creditors, as a creditor to that amount, and to so certify to the assignee in this case.

In re E. R. STEPHENS.

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN—FEBRUARY, 1872.

IN BANKRUPTCY.

1. SURRENDER OF PREFERENCE.—A full surrender by a creditor of a preference fraudulent under the act restores him to all his rights, and he may prove his claim against the estate.

2. WHEN MUST BE MADE.—Whether this may be done after suit is brought, is a matter of discretion with the court. It will not be allowed after a recovery.

3. There is no distinction in this respect between voluntary and involuntary bankruptcy.

4. CHATTEL MORTGAGE—WHEN FRAUDULENT.—A chattel mortgage taken by a retiring partner on all the firm goods, including property to be afterwards acquired, and by agreement kept from the records, is fraudulent and void as to subsequent creditors of the continuing partner.

5. TRANSFER IN PAYMENT.—A transfer of the property to the retiring partner in payment of his mortgage can be set aside by the assignee, and the mortgagee will not, in such case, be allowed to prove his debt.

6. WHAT DEBTS RETIRING PARTNER MAY PROVE.—For such partnership debts, however, as he may have paid or assumed, he will be allowed to prove, he having as partner a right to contribution.

This was a motion on behalf of the assignee in bankruptcy to expunge certain debts proven by Satterlee Warden against the bankrupt's estate, on the ground:

First—That he had received a preference by way of payment from the bankrupt which he had not wholly surrendered.

Second—That the debts were void as arising out of a transaction between the parties entered into to defraud the creditors of the bankrupt.

For about five years prior to March 31, 1870, E. R. Stephens and Satterlee Warden were co-partners in mercantile business at Darlington, in this district. On that day the firm dissolved,

owing Warden for capital in the business $15,000, and third parties $11,000. They had assets of the value of $19,750, $6,000 of which was real estate, and the balance consisted of the stock of merchandise, notes and accounts. Stephens had no capital in the business, and his individual property, besides his homestead, did not exceed $600. Stephens and Warden settled on that day, Stephens buying Warden's interest in the firm property, except the real estate, giving his notes for $7,000, secured by a chattel mortgage on the stock then on hand and thereafter to be acquired. He also agreed to pay the $11,000 of firm debts, and Warden took the real estate of the firm at $6,000. By agreement between them the chattel mortgage was not filed until March 30, 1871. Stephens continued the business alone until March 21, 1871, when he transferred his stock of merchandise and notes and accounts, valued at $12,000, to Warden, in payment of the $7,000 due him, Warden at the same time agreeing to pay the firm debts, which were then about $5,000.

On petition afterwards by his creditors Stephens was adjudicated a bankrupt. The assignee filed a petition against Warden to compel him to surrender the property thus taken by him, as being a preference under the act. On the hearing Warden asked to have proceedings stayed that he might surrender the property, which was granted by the court; and Warden thereupon surrendered the property to the assignee, and then filed claims against the bankrupt's estate for the $7,000, for which he had Stephens' notes and mortgage, and for the $5,000 of firm debts, which Warden had agreed to pay. After March 31, 1871, Stephens contracted other debts in his business to the amount of $7,000, which were still unpaid.

P. A. Orton, Jr., for assignee.

H. S. Orton, for Warden.

Hopkins, J.: At the conclusion of the argument I announced that I regarded the transfer of the property by the bankrupt to

Mr. Warden, on the 20th of March, 1871, in payment of these claims, as clearly creating a preference within the meaning of the bankrupt law, and a plain violation of its provisions. I further stated that I thought the testimony showed that he had surrendered all the property he had received of the bankrupt upon said debts before filing the proof of his claims, although he did not do so until after the testimony had been taken on proceedings to recover it.

But upon the question as to the effect of the surrender at that time, as well as several other matters discussed, I took the case under consideration, and after a careful examination of the whole case, I have come to the conclusion that Mr. Warden, by the surrender of the property that he took in payment of these claims of the bankrupt, relieved himself from the penalty prescribed in the 39th section of the act.

I fail to see any reason for a distinction between sections 35 and 39 in that respect. The attempt to maintain a distinction between voluntary and involuntary proceedings fails to commend itself to my judgment.

A full surrender of a fraudulent preference by a creditor is a complete condonation of that offense, as I understand the provisions of section 23. That section is not limited in its operation to cases of voluntary proceedings.

The preference is what the law denounces, the intent of the act being to secure an equal distribution of the estate of a bankrupt among all his creditors; and if a creditor voluntarily yields a preference he may have acquired or attempted to acquire, and surrenders all the property, so that it does not in any manner interrupt the equal distribution required by the act, the party is restored to his rights as they stood before the preference. If a creditor, having received preference, refuses to surrender, and a suit is prosecuted against him by the assignee for the property or money unlawfully received as a preference, and a recovery is had against him, he cannot then surrender and receive the benefits of that section. He is then by section 39 forbidden the privilege of proving his debt or

receiving any dividend; and it may be a matter of discretion with the court whether a party should be allowed to surrender after suit brought, and particularly after the testimony is taken, and the defendant becomes satisfied that it is enough to defeat him.

I do not think the spirit of the act would warrant a practice of that kind. A party should not be allowed to experiment and speculate upon the ability of the assignee to prove a case against him, and when he sees he has succeeded then to plead guilty and surrender, and take the benefit of section 23. Such a practice ought not to be tolerated, and hereafter, except under very peculiar circumstances, I shall not allow a party guilty of a fraudulent preference to surrender after suit brought and prove his debt under section 23; and if, on examination, I should conclude I had the power to prevent it, I shall expect a party to elect, and after having elected, shall hold him to his election. But in this case, he did surrender, and I think he is, therefore, relieved from the penalty imposed by the bankrupt act.[1] So, if the case of the assignee rested wholly upon the bankrupt act, the motion would be denied.

But a question of far more importance and difficulty is presented, that is, whether the transaction between Warden and the bankrupt on the 30th of March, 1870, was not intended to defraud the subsequent creditors of Stephens, and hence void at common law. It is claimed if I should so find, that that fraud is not condoned, but inheres in the transaction, and renders void all the promises Stephens made with Warden upon such transaction, and that no court should lend its aid to enforce them or either of them; that the case will then fall within the principle of the maxim *ex turpi causa, non oritur actio.*[2]

In order to rightly understand my conclusions on this point,

[1] *In re Scott et al.*, 4 Bankrupt Register, 139; *Tonkin vs. Trewartha*, id. 18; *In re Kipp*, id. 190; *In re Montgomery*, 3 do. 97; *In re Davidson*, id. 106.

[2] *Nellis vs. Clark*, 20 Wendell, 24, and cases cited.

it will be necessary to briefly state some of the facts established by the evidence. Stephens and Warden were partners in the mercantile business, at Darlington, commencing sometime in 1865. Warden was the man of means; Stephens the active man, although both gave some personal attention to the business. The business was not successful, and before March, 1870, Stephens had withdrawn, and used up all his capital, and the company was owing Warden $15,000, and their other liabilities were a little over $10,000. On the 31st of March, 1870, an inventory was completed, which showed that the firm nominally had assets equal to the debts, or nearly so, but they were not equal in actual value to the firm liabilities by several thousand dollars. Stephens had very little except his homestead. The firm was then insolvent, although Mr. Warden was perfectly good, and able to pay all the liabilities. On that day they dissolved, and Warden transferred his interest in the firm assets to Stephens, except the real estate, which Warden took at $6,000, and applied towards the amount the firm owed him; Stephens agreed to pay all the firm debts to third parties, and gave his note for $7,000 to Warden, that being the balance due him, which he secured by chattel mortgage upon the goods then in the store, and upon all such as he might afterwards acquire, until the payment of that debt. It was agreed, however, that the chattel mortgage was not to be filed, for the alleged reason that if it was it would prevent Stephens buying any more goods on credit.

It must have been known to Mr. Warden that Mr. Stephens was insolvent, and that he could not, out of the stock, pay the indebtedness assumed by him; and the case fails to disclose any ground for a belief upon the part of Warden of the ability of Stephens to go on long with the business. It had been unsuccessful with the credit his name had given to it, and in the light of the testimony no court could find that Mr. Warden believed Stephens would be able to continue long, and the taking of the chattel mortgage to secure the debts to him shows that he meant to keep a control of the stock and goods, so that

he could at any time secure himself by taking possession. In view of these facts, I am forced to the conclusion that it was a scheme on the part of Warden and Stephens to clothe Stephens with the apparent ownership of the property, and send him out to obtain goods on credit from parties ignorant of the condition of his affairs and of the security to Warden, and thus enable him to obtain the means with which to pay the balance due to Warden, which in any other way he would be unable to do. Warden must have known such would be the probable result of Stephens' undertaking, and when he consented to keep his mortgage off the record he must be held to have done so with a view of enabling Stephens to obtain credit that he ought not to have, and to obtain property that he could not pay for, and which, according to the terms of this mortgage, was incumbered by it as soon as placed in the store.

I must, upon these facts, hold that the design of these parties was to defraud the subsequent creditors of Stephens, and therefore that the notes and chattel mortgage given to Warden were absolutely void as to the subsequent creditors of Stephens, and that the proof of debt filed therefor must be stricken out. This I find was a fraud upon the subsequent creditors, and this case should be treated as if they were the parties contesting it. The assignee is, in reality, acting in their interest.

The parties entered into this arrangement for the real purpose of casting upon the subsequent creditors the hazards of Stephens' success in continuing the business. All the property he could get, they supposed, was covered by this mortgage to Warden, so that Warden would be secured anyway.

Suppose the subsequent creditors, instead of proceeding in bankruptcy, had proceeded by attachment and taken this property, and Warden had commenced his action to recover it back upon his mortgage, can it be possible, upon the facts as proven in this court, that a court or jury would hesitate a moment in finding that this scheme was devised to defraud

Stephens' subsequent creditors? The facts constitute fraud—fraud in *fact*.[1]

The taking of the mortgage which expressly covers the goods Stephens might *afterwards acquire*, as well as those he then had, and keeping it from the records for the express purpose of enabling him to acquire more upon credit, in view of his pecuniary situation and the known hazardous nature of the business he was engaged in, are sufficient to warrant and authorize any court to find that Mr. Warden was acting in bad faith toward the parties who might, in ignorance of his claim, sell Stephens goods on credit, and I know of no principle of law or equity that would allow him to hold such property as against the creditors thus deceived, or to share with them in its distribution.

The subsequent conduct of the parties is in harmony with this construction. When the crisis came we find Warden taking all the property and accounts to pay his debts and the balance of the firm debts, without making any provisions for subsequent creditors. It was insisted by the counsel for the assignee that the claims proven by Warden as company debts, should be excluded upon the same ground, as the contract of dissolution embraced them as well as the payment of his individual debts; but I think they are distinguishable. Mr. Warden's right to prove them does not rest wholly on the agreement made by Stephens at that time; if it did, I think they would be void on the same grounds. But he had no claim until he had paid the debts, and when he paid them he had the right to claim contribution of Stephens, independent of the agreement and the right to prove them and have them allowed to the extent of his right to contribution; and as between the parties in the case, he would be entitled to the whole sum paid, as he had largely overpaid his portion, and the

[1] *Case vs. Phelps*, 5 Bankruptcy Register, 452; *Stillman vs. Ashdown*, 2 Atkyns, 481; *Reade vs. Livingston*, 3 Johnson's Chancery, 481; *Parrish, et al. vs. Murphree, et al.*, 13 Howard, 99.

company, and Mr. Stephens as one of the members, were owing him a much larger amount than these claims. He stands on his rights as partner to be reimbursed for his advancements, and can recover independent of the agreement, and if the agreement was void it cannot be said to merge his original claim, nor be set up, if void, by Stephens or those representing him as a defense to such original claim.[1] Again, there was no contract made to defraud existing creditors; the fraudulent part of the agreement related to the effort of Warden to get his pay at the expense of future creditors, and only that part which was fraudulent should be held void.

Warden's claim for the $5,000 of firm debts which he had assumed will be allowed, but not the $7,000 claim upon Stephens' notes to him.

A suggestion was made by me upon the argument, in relation to a mortgage given by Stephens to Warden to secure certain notes indorsed by Warden, to the effect that a release of that portion of the property not embraced in the homestead set-off, might entitle Mr. Warden to prove those claims. On further reflection I am inclined to think that, in order to be allowed to prove these claims, he should discharge the mortgage absolutely. I think, in order to be allowed to prove a debt unlawfully preferred, the party must wholly surrender the unlawful preference—wipe out the security entirely.

That a creditor who has accepted a chattel mortgage with a view to obtain a preference, not only loses the lien of his mortgage, but will not be allowed to prove his debt. *Bingham vs. Richmond & Gibbs*, 6 Bankruptcy Register, 127.

That preferred creditor may surrender and then prove debt. *In re Richter's Estate*, 4 Bankruptcy Register, 67.

May be after suit brought, but must be before judgment. *Hood vs. Karper*, 5 do., 358; *contra*, *Phelps vs. Stearns et al.*, 4 do., 7.

Same in involuntary as in voluntary bankruptcy. *In re Scott & McCarty*, 4 do., 139; *contra*, *In re Princeton*, 1 do., 178; *In re Colman*, 2 do., 171; *In re J. J. & C. W. Walton*, 4 do., 154. [*Reporter.*

[1] *Meshke vs. Van Dorn*, 16 Wisconsin, 320, 325; *Terreal vs. Sharen*, 1 Saunders, 295; *The Queen vs. Seuel*, 7 Modern, 119; *Vilas vs. Jones*, 1 Comstock, 276; *Johnson vs. Johnson*, 11 Massachusetts, 359.

In re CARTER.

DISTRICT COURT—DISTRICT OF INDIANA—MARCH, 1872.

IN BANKRUPTCY.

1. WHEN a man enters the commercial community he assumes all the responsibilities attaching to his calling, and is bound to take care of his commercial paper, whether made before or after he commenced business, and whether given in connection with his business or not. Therefore, if his commercial paper, given before, but falling due after he engaged in business, is allowed to remain unpaid for fourteen days after maturity, he can be adjudged a bankrupt.

This was a petition in bankruptcy filed by the Hydraulic Woolen Mill Company, of Columbus, Indiana, against William Carter, of the same place, alleging three distinct acts of bankruptcy:

First—That Carter sold and delivered to David Aiken personal property to the value of six hundred dollars, receiving a credit for that amount upon a debt due from him to Aiken, he, Carter, being at the time insolvent, and intending by the payment to give Aiken a preference.

Second—That Carter, being insolvent, and intending to give Francis J. Crump an unlawful preference, transferred to him, in payment of a debt, the promissory note of Harvey Daily for one thousand dollars.

Third—That Carter, being a merchant, trader and manufacturer, suspended payment of his commercial paper, and had not resumed payment within a period of fourteen days; the said paper being Carter's promissory note for seven hundred dollars, made at Columbus, Indiana, on the 17th day of June, 1870, payable in one hundred and eighty days, to the order of the Hydraulic Woolen Mill Co., at the bank of McEwen & Sons, in the said city of Columbus.

The facts appear in the opinion.

McDonald, Butler & McDonald, for creditor.

Porter, Harrison & Hines, for bankrupt.

GRESHAM, J.: I think the testimony shows that at the time of the sale and delivery of the personal property to Aiken, and of the transfer of the Daily note to Crump, Carter was insolvent; but it is not so clear that in these acts he intended preferences in favor of Aiken and Crump. The question is embarrassing, and I shall not undertake to dispose of it. It ceases to be important, inasmuch as Carter must be adjudged a bankrupt on the third ground specified in the petition.

Promissory notes payable to order or bearer, in a bank in this state, are by the statutes of Indiana placed on the footing of inland bills of exchange. The note described in the third ground of bankruptcy in the petition and put in evidence, is therefore Carter's commercial paper. At the time the note was executed he was not in business; he was neither merchant, trader, nor manufacturer, but at the time the note fell due, and the obligation to redeem his promise to pay matured, he was the owner of a large flouring mill, and engaged in buying wheat, and in manufacturing and selling flour. The precise question thus presented has never been passed upon by the courts, and is one of great importance to the commercial community.

It is argued with much force and earnestness by counsel for respondent, that the note is not commercial paper within the meaning of clause nine, section thirty-nine of the bankrupt act, because, when executed, Carter did not belong to any of the classes designated in that clause, and did not therefore pledge himself to commercial promptness in its payment. I am referred to the cases *in re Nickodemus*, 3 Bankrupt Register, 55; *in re McDermott, Pat. Bolt Manf. Co.*, 3 Bankrupt Register, 33; *Davis vs. Armstrong*, 3 Bankrupt Register, 7; *Innes vs. Carpenter*, 4 Bankrupt Register, 139; and *Katzenberg vs. Lowenstein*, 2 Bankrupt Register, 99, in support of the position that the statute, in naming commercial paper, means paper

given by a merchant, trader, manufacturer, etc., in the direct course of his business. The authorities upon this point are not uniform, and I am left therefore free to follow those which seem best supported by reason.

The language of the statute is: "Who being a banker, broker, merchant, trader, etc., * * * * has stopped or suspended, and has not resumed payment of his commercial paper within a period of fourteen days."

The phrase, "commercial paper," as here employed, was intended, it seems to me, to embrace all paper which by usage or statute, is brought within the custom of merchants. I think with LOWELL, J., *in re Chandler*, 4 Bankrupt Register, 66, that in saying that any person belonging to one of certain designated classes should be deemed a bankrupt if he failed to pay his commercial paper, Congress simply referred to a well known and conclusive test of insolvency.

The language of the act above quoted is a legislative declaration of insolvency applied to the particular classes named on account of their relation to the commercial world.

In *Davis vs. Armstrong*, above cited, HALL, J., held that the statute extended to one who at the time he made the note was a merchant, but had gone out of business before it became payable. Such a construction, however, would not warrant the conclusion that one who is within the letter is not also within the meaning of the act. To embrace the first class, the statute must be so extended as to include persons not within its language; while to exclude the second class, is to adopt a construction which rejects those who are expressly within its terms.

If the construction for which the respondent's counsel contend is the true one, it becomes necessary to inquire into the origin of the debt, in proof of which a note or bill is offered; and a merchant, trader, or manufacturer, may suspend payment of all his commercial paper, except such as he has executed in connection with his particular trade or business, and yet maintain his standing for solvency in the commercial world. The

dishonor of the paper of a merchant, trader, or manufacturer, given when not engaged in business, or, if he were in business, given in some transaction not immediately connected with his business, is not less damaging to his commercial reputation than the dishonor of commercial paper given in the usual course of his business. One affords no better test of insolvency than the other.

When a man enters the commercial community as a merchant, trader, banker, or otherwise, he assumes all the responsibilities which attach to his calling. One of these is the obligation to take care of all of his commercial paper, whether made before or after he commenced business, and whether given by him as the result of his particular business, or as the result of some transaction not directly within the scope of that business.

The respondent is adjudged bankrupt, and the proper decree will be entered.

RIPLEY vs. HARRIS.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—APRIL TERM, 1872.

IN EQUITY.

DESCRIPTION IN MORTGAGE.

1. In a contest between mortgagees, the clause creating the lien must prevail. A mortgage of one undivided *fourth* part of certain lands is not to be construed or enlarged by the description as being one undivided *half* part.

2. The mortgage first recorded is the prior lien.

3. MORTGAGE TO SECURE FUTURE ADVANCES,—Is valid, but it will not secure advances made by the mortgagee after he has actual notice of a subsequent mortgage, in the absence of a contract to make such advances.

4. *It seems*, that where the President of a bank takes in his own name a mortgage to secure loans made by the bank, at his instance, the bank is the creditor of the mortgagor, and also of the President while he holds the securities, and may either hold the President for the debt, or compel him to surrender the securities.

5. When the point that a security is invalid as having been taken in violation of the National Banking Act, is not made in the pleadings, it will not be acted upon by the court, although disclosed by the proofs.

This was a bill for foreclosure of a mortgage brought by the complainant against Charles L. Harris and wife, John Reynolds, the First National Bank of Madison, Napoleon B. Van Slyke, Andrew Sexton, and other lien creditors.

Harris and Reynolds were partners in business at Jacksonport, in Door county, Wisconsin. As such partners, in their partnership name, on the 23d of November, 1868, they made their promissory notes to complainant, William Ripley, one for $500 payable sixty days after date, one for $1,500 payable five months after date, and the third for $3,000 payable seven months after date. On the same day John Reynolds and

Charles L. Harris and wife, to secure the payment of said three notes with interest, executed and delivered to complainant a mortgage, expressing the consideration at $5,000, upon lands in said county of Door, and recorded in said county on the 27th day of November, same year.

On the 5th day of June, 1868, one Michael Reynolds was the owner of an undivided half interest in said lands. John Reynolds, for the purpose of raising money to promote and carry on the business of Harris and Reynolds, made his bond to N. B. Van Slyke in the penal sum of $10,000, for the payment to the said Van Slyke, or assigns, of all money due on any note or notes, drafts or acceptances, or other evidences of debt, that then did or might thereafter exist against John Reynolds, in favor of said Van Slyke, his heirs or assigns, and to save the said Van Slyke, his heirs or assigns, harmless against any liability for or on account of said Reynolds; and as security said Michael Reynolds made and delivered to Van Slyke a mortgage on "one undivided *one-fourth* interest or portion" of the premises described therein, "being an undivided *one-half part* of three thousand two hundred and twenty acres of land, on a portion of which is the steam saw mill, pier and buildings of Jacksonport; subject to the undivided one-half portion of $480 due the state of Wisconsin on school land certificates for a portion of the above land." The condition of said mortgage was, that John Reynolds should pay, or cause to be paid, to the party of the second part, Van Slyke, the sum of $5,000, according to the condition of a certain bond of John Reynolds, bearing even date therewith. This mortgage was recorded in Door county, June 16, 1868. April 22, 1869, in consideration of $5,000 paid by Andrew Sexton, Van Slyke assigned to him this mortgage and bond, to be collected by Sexton at his own expense, with covenant on the part of Van Slyke that he had good right to assign the same. The assignment was recorded in Door county, April 30, 1869.

The complainant claimed that the Van Slyke mortgage was a lien on only the *one-fourth* interest in said land, and that as

to the remainder, his was a valid first lien, and prayed a decree accordingly.

The defendant, Sexton, answered, insisting that the Van Slyke mortgage assigned to him was a first lien upon the *half* interest which Michael Reynolds owed at the time it was given.

The further facts are stated in the opinion.

Wm. F. Vilas, for complainant.

S. U. Pinney, for Andrew Sexton.

MILLER, J.: The mortgage of Michael Reynolds to Van Slyke is a recorded mortgage lien on the one undivided *fourth* part of the premises described. That part of the description of the land as being the undivided *half* part cannot control the clause creating the lien, as against subsequent incumbrances. As to them the clause creating the lien is the test.

The record of this mortgage is constructive notice of an apparent lien in favor of Van Slyke to the amount of $5,000, according to the terms and conditions of the bond mentioned; and Ripley accepted his mortgage with that constructive notice. He might have inquired after the bond, to ascertain its real conditions, but he did not. He testifies that he never saw the bond, nor never knew nor inquired what had been done under it. The mortgage did no injustice to Ripley. It was a legal lien for $5,000, expressed on its face, and of which he had lawful notice by the record. It was not required that the condition of the bond be recited in the mortgage. The reference to the bond was sufficient.[1] And a mortgage to secure future advances is valid.[2] Such a mortgage is good to the amount specified in the bond. This mortgage stands as a security for the real equitable claims of the mortgagee, whether they existed at the date of the mortgage, or arose afterwards,

[1] *Shirras vs. Caig*, 7 Cranch, 34.

[2] *Lawrence vs. Tucker*, 23 Howard, 14.

but prior to the receipt of actual notice of a subsequent sale or mortgage.

The pleadings and proofs involve the equitable interests of the complainant under his mortgage, and of Andrew Sexton as assignee of N. B. Van Slyke's mortgage.

It is understood that there did not exist any indebtedness from Reynolds to Van Slyke at the date of the bond and mortgage.

It is also understood that Sexton cannot acquire by the assignment of the bond and mortgage, a greater equity than Van Slyke had at the date of the assignment of these securities.

The notes of Reynolds had been discounted by the First National Bank of Madison, of which Van Slyke was the president, at his instance and request, made on the faith and credit of the securities. Notes were made by Reynolds and handed to Van Slyke, and he procured them to be discounted by the bank; and on the books of the bank the money was placed to the credit of Reynolds. The notes were renewed from time to time, until they came to be represented, so far as any indebtedness existed, by two notes of $2,000 each, numbered 3334, 3360, dated September 25, 1868, and prior to complainant's mortgage. These notes were payable to the First National Bank of Madison. It does not appear that they were indorsed by Van Slyke. They were a continuation of the original indebtedness.

Van Slyke, being president of the bank, had the bond and mortgage made to himself, the bank being prohibited by the national banking act of June 3, 1864, from taking real estate security for present loans. The loan was made by the bank, and Mr. Van Slyke's ingenuity does not relieve the bank from the imputation of violating the statutory prohibition. But the point of invalidity of the securities for this reason, is not made by the pleadings.

The bank became the creditor in fact of Reynolds, and Van Slyke stood as surety, the loan having been made by the bank

at his request and on his responsibility. The bank could hold Van Slyke for the debt in equity, upon the strength of the securities of indemnity held by him in his own name. The bank had the legal right to hold Van Slyke for the debt, or to require him, in equity, to surrender the securities. The securities to Van Slyke were, in equity, securities to the bank, the real creditor. The legal liability of Van Slyke to the bank was not prohibited by the statute of frauds. It was not a promise to pay the debt of another, but an original contract with the bank, upon which the loan was obtained. The two notes of $2,000 each fell within the condition of the bond and mortgage to Van Slyke.

Five thousand dollars were appropriated to the discharge of the two notes of $2,000, with interest, and the residue applied to the credit of Reynolds, on some other indebtedness to the bank.

It appears that Van Slyke, the president and agent of the bank, had notice of Ripley's mortgage in December, 1868. Reynolds, on the day of the transfer of the securities to Sexton, gave a note to Van Slyke, or bearer, for $5,000, payable at the bank one year after date. This was done under the impression that the mortgage of Reynolds was a lien for the full amount of the debt mentioned on its face, without regard to its reference to the condition of the bond. Van Slyke and the bank, upon the payment of $5,000 by Sexton, relinquished all further claim or right under the bond and mortgage, and to the note of John Reynolds, made at the same time, to Van Slyke or bearer, by which Van Slyke evidently intended all obligations or liability for the debt of Reynolds and all further interest in the securities to cease, and Sexton to collect the debt at his own cost and charges, as expressed in the assignment. And the note of $5,000, payable to Van Slyke or bearer, was intended as evidence that Sexton held an indebtedness against Reynolds equal in amount to the bond and mortgage.

The note of Reynolds, given in April, 1869, the time of the assignment of the securities to Sexton, was merely an evidence

of a personal promise on the part of Reynolds for the difference between the two $2,000 notes and the note of $5,000. For this difference the mortgage was no security, being an advance made subsequent to the 10th December, 1868, when Van Slyke had notice of Ripley's mortgage, and he was not under obligation to make further advances upon such note. Equity excludes both Van Slyke and Sexton as to the surplus over the two notes and interest. To that extent Sexton has a prior lien on the one undivided fourth part of the mortgaged premises.

Decree accordingly.

In re LAKE.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—MAY TERM, 1872.

IN BANKRUPTCY.

1. TRANSFER OF PROMISSORY NOTES.—The transfer of promissory notes by the payee during the pendency of bankruptcy proceedings against him upon which he was afterwards adjudged a bankrupt, and of an injunction restraining him from disposing of his property, vests no title in the purchaser, even though he had no actual notice of the bankruptcy proceedings.

2. WHO TO TAKE NOTICE OF PROCEEDINGS.—All the world is bound to take notice of proceedings in bankruptcy, and the purchaser takes with constructive notice.

3. ADJUDICATION RELATES BACK, ETC.—The adjudication of bankruptcy relates back to the time of filing the petition, and carries with it title to the assignee to all property and all interest in the property which the bankrupt had at that time; and the assignee can recover such notes from the purchasers.

In re Lake.

4. PURCHASER RULED TO DELIVER WITH PROPER ASSIGNMENT.—This case is not within the rule that negotiable bills of exchange, which have been stolen, cannot be recovered from a *bona fide* holder, and the court will in such circumstances rule him to deliver them to the assignee.

This was a petition by Wm. B. Dwight, the assignee of John J. Lake, to compel the respondents, Charles Commerford and J. W. Lawrence,to deliver to him certain promissory notes alleged to belong to the bankrupt's estate.

On the 24th of July, 1868, certain creditors of Lake filed their petition in this court, charging him with acts of bankruptcy, and the usual rule was entered requiring him to show cause why he should not be adjudged a bankrupt. At the same time an injunction was issued restraining Lake from selling, incumbering, or otherwise disposing of his property, or any part thereof, until the further order of the court. Lake filed a denial of the acts of bankruptcy charged, and demanded a jury trial, and the case stood at issue and for trial on this denial, and the injunction remained in full force on the 12th of October, 1868, on which day Lake, who resided in Livingston county, called on the respondents who were and are bankers residing and doing business at Morris, in Grundy county, and offered to sell them three promissory notes for the sum of five hundred dollars each, dated the 13th of July, 1868, made by one Charles G. Peters, payable to said Lake, and secured by a mortgage on a tract of land in Livingston county, which Lake had conveyed to Peters. Lake was a stranger to respondents, but he was accompanied by one Clarke who was well known to them, and in good financial credit. Lake being a stranger, respondents refused to buy the notes of him unless Clarke would guaranty the payment thereof. The negotiation finally resulted in respondents purchasing the notes for the sum of $1,200, Lake indorsing and Clarke guaranteeing them, and Lake assigning to respondents the mortgage by which the notes were secured. Upon the trial of the case made by the petition and denial, Lake was found guilty of the acts of bankruptcy, and adjudged a bankrupt by the court. An assignee was duly

elected, and the estate of the bankrupt conveyed to him, and the assignee now files this petition.

King & Willard, for assignee.

S. W. & T. B. Harris, for respondents.

BLODGETT, J.: By the fourteenth section of the bankrupt act all the property and rights and interest in property which the bankrupt had at the time of the filing of the petition pass to the assignee, and the title of the assignee relates back to the time of the filing of the petition.

The filing of the petition praying the adjudication in bankruptcy is notice to all the world, and all persons dealing with the person thus charged do so at their peril. No person can, by dealing with a debtor thus situated, acquire any title to his property as against his assignee in bankruptcy, if the proceeding ripens into a judgment of bankruptcy.[1]

But it is contended that negotiable paper forms an exception to this rule, and that the *bona fide* purchaser of such paper will be protected, although a petition in bankruptcy may be pending against the seller of such paper; and the counsel for respondents have presented an exceedingly ingenious and plausible argument in support of this proposition, relying mainly upon a class of cases where it has been held that bank notes, bills of exchange, and promissory notes, even when stolen or obtained from the owners by actual fraud, could not be recovered, if they had passed to *bona fide* purchasers for value without notice. To my mind, however, the difficulty in applying this principle of law to the case before the court arises from the fact that the respondents cannot be said to be *bona fide* holders without notice. All the parties to the transaction were domiciled in this district, and the transaction took place within the district.

[1] *In re Gregg*, 3 Bankruptcy Register, 131; *Ex parte Vogel*, 2 do., 138; *In re Wynne*, 4 do., 5.

The proceedings in bankruptcy were then pending, and the bankrupt, Lake, was then under an injunction from this court prohibiting him from selling or disposing of any of his property. The respondents are concluded by the notice thus given them by the records of this court, and it does not lie in their mouths to say they are innocent purchasers.

The rule relied upon by the attorneys for respondents arises from the policy of the law in favor of protecting commercial transactions in negotiable or commercial paper made in due course of business, without fraud and for value paid. But an equally inexorable rule requires that all persons shall be held to take notice of judicial proceedings pending in courts having general jurisdiction over them.

The decree will be that respondents be required to deliver the notes in question to Lake's assignee within ten days.

It was also urged that inasmuch as these notes bear Clarke's guaranty of payment to respondents, some order should be made enabling them to avail themselves of it; but as Clarke is not before the court, I think the most the court can do at present is to require the assignee to preserve the notes and guarantie thereon intact for a reasonable time at least, so that they may be used as evidence hereafter, if required in any proceedings by respondents against Clarke.

UNITED STATES vs. BLOCK 121.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JUNE, 1872.

CONDEMNATION.

1. CONDEMNATION.—A proceeding under an act of Congress to condemn property is a "suit of a civil nature at common law or in equity," within the meaning of the Judiciary Act.

2. JUDICIARY ACT—JURISDICTION OF FEDERAL COURTS EXTENDS TO SUBSEQUENT CASES.—The construction of that clause cannot be limited to such suits as were known at the time of the passage of the act. Whenever an act is passed which authorizes the commencement of a suit, jurisdiction of the case is thereby vested in the Federal courts, if the character of the parties warrants it, and it comes within the meaning of the statute. The grant of power in this act is prospective.

3. JURISDICTION NOT RESTRICTED TO OLD FORMS.—The clause, "suits of a civil nature at common law or in equity," was used in contradistinction to admiralty and criminal cases. It does not restrict the jurisdiction to old and settled forms, but includes all suits in which legal rights are to be ascertained and determined.

4. EXTENDS TO CONDEMNATION ACCORDING TO STATE STATUTE.—Congress has power to clothe the Federal courts with authority to proceed for the condemnation of property in conformity with a particular State statute.

5. ACT OF DECEMBER 21ST, 1871.—It was the intention of Congress in this act to give this court jurisdiction of the condemnation proceedings therein contemplated.

6. CONFLICTING CLAIMANTS.—Though the officers of the Government had stated to the owners of the ground the price which the Government was willing to give, yet if other parties had liens and claims against the property, which they were not willing to surrender, condemnation proceedings are necessary.

7. PROCEEDINGS—BY WHOM INSTITUTED.—The Secretary of the Treasury being the mere officer of the Government, when proceedings are instituted by him under a special law they become necessarily proceedings on the part of the United States; and although the petition be filed by the district attorney, it is within not only the spirit, but the letter of the acts of Congress.

United States vs. Block 121.

This was a petition filed by the District Attorney, in the name of the United States, for the condemnation of Block 121, school section addition to Chicago, commonly called the Bigelow Block.

The various parties claiming an interest in the land or any part of it, whether as owners of the fee, tenants, or by mortgages, judgments, liens, or otherwise, were made parties defendant, and commissioners appointed by the court, in conformity with the state statutes, who heard the evidence as to the value of the property, the damages to be assessed, and the rights and interests of the respective parties. On the coming in of this report some of the parties in interest moved to dismiss the proceedings on the ground that the court had no jurisdiction.

These proceedings were instituted for the purpose of obtaining ground for the erection of a custom-house and government buildings in Chicago, in pursuance of the act of the Legislature of Illinois of December 14th, 1871, and the act of Congress of December 21st, 1871.

The act of the Legislature of Illinois (2 Gross, page 438) is as follows:

"§ 1. The United States shall have power to purchase or condemn, in the manner prescribed by law, upon making just compensation therefor, any land in the state of Illinois required for custom-houses, arsenals, light-houses, national cemeteries, or for other purposes of the government of the United States.

"§ 2. The United States may enter upon and occupy any land which may have been or may be purchased, or condemned, or otherwise acquired, and shall have the right of exclusive legislation and concurrent jurisdiction together with the state of Illinios, over such land and the structures thereon, and shall hold the same exempt from all state, county and municipal taxation."

The act of Congress of December 21, 1871,[1] provides, "That

[1] 17 U. S. Statutes at Large, 24.

the Secretary of the Treasury be, and he hereby is authorized and directed to purchase, at private sale or by condemnation, in pursuance of the statutes of the state of Illinois, the remainder of the square of ground not now belonging to the United States, on which the custom-house and post-office building, lately destroyed by fire in the city of Chicago, was situated, if the same can be obtained either by private purchase or condemnation, at what, in his judgment, is a fair and reasonable price for the ground; but if not, then it shall be his duty to purchase, in one of the ways aforesaid, one of the twenty-four squares of ground nearest to and immediately surrounding the square on which said building destroyed by fire was located. * * * * *Provided*, That no money hereby appropriated shall be used or applied for the purpose until a valid title to the land for the site of such building shall be vested in the United States, and until the state of Illinois shall cede its jurisdiction over said site, and shall also duly release and relinquish to the United States the right to tax or in any way assess said site or the property of the United States that may be thereon during the time that the United States shall be or remain the owner thereof."

Edward Roby, for the motion.

There are large classes of cases wholly within this judicial power, which it is held the courts of original jurisdiction cannot entertain, notwithstanding the clear implication of the constitution. *Cary vs. Curtis*, 3 Howard, 245; *Insurance Co. vs. Ritchie*, 5 Wallace, 541; *McIntire vs. Wood*, 7 Cranch, 504; *McClung vs. Silliman*, 6 Wheaton, 604.

Though state forms may sometimes be adopted by the courts for convenience, state laws cannot confer jurisdiction, nor prescribe the modes or forms of proceeding in federal courts. *Riggs vs. Johnson Co.*, 6 Wallace, 178–9, 195; *Bronson vs. Kinzie*, 1 Howard, 314; Cases cited in Brightly's Federal Digest "Execution," 1; *Boyle vs. Zacharie*, 6 Peters, 648, 658.

J. O. Glover, District Attorney, and *L. H. Boutell*, Assistant District Attorney, for the United States.

The United States circuit court has original cognizance of all suits of a civil nature at common law, when the United States are plaintiffs or petitioners. Act 24th of Sept., 1789, § 11, 1 U. S. Statutes at Large, 78; U. S. Constitution, Art. 3, § 2; Act of March 3, 1815, § 4, 3 U. S. Statutes at Large, 245.

The act of March 3, 1815, gives the United States jurisdiction to sue, irrespective of the amount in controversy. *Postmaster General vs. Early*, 12 Wheaton, 136.

By cases in law are to be understood suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are to be recognized, and equitable remedies administered, or where the proceeding is in the admiralty. *Parsons vs. Bedford*, 3 Peters, 447; *Robinson vs. Campbell*, 3 Wheaton, 212.

Parties entitled to sue in the courts of the United States, are in general entitled to pursue, in such courts, all the remedies for the vindication of their rights which the local laws of the state authorize to be pursued in its own courts.

Such is a statutory proceeding for partition. *Ex parte Biddle*, 2 Munn, 472; STORY, J.; *Mason vs. Boom Co.*, 3 Wallace, jr., 252; 20 Legal Intelligencer, 12; *Bank of Hamilton vs. Dudley*, 2 Peters, 492.

The legislature of a state cannot, by enacting a special remedy in their own county courts, take away the privilege conferred by the constitution and laws of the Union upon citizens of other states, to sue in the courts of the United States. *Mason vs. Boom Co.*, 3 Wallace, jr., 252.

Consult also on the general question of jurisdiction, 1 Abbott's U. S. Practice, 230–4; *Parsons vs. Lyman*, 32 Connecticut, 566; *The St. Lawrence*, 1 Black, 522; *The Orleans vs. Phobus*, 11 Peters, 175; *Le Roy vs. Nathan*, 22 Howard, 132; *Toland vs. Sprague*, 12 Peters, 300; *Watson vs. Tarpley*, 18 Howard, 517; *U. S. vs. Peters*, 5 Cranch, 115; *Clark vs. Smith*, 13 Peters, 195; *Parker vs. Overman*, 18 Howard,

137; *Clark vs. Sohier*, 1 Woodbury & Minot, 368; *Lorman vs. Clarke*, 2 McLean, 568; *Strachan vs. Clyburn*, 3 do., 174.

DRUMMOND, J.: It may be conceded that there must be an act of Congress which has given the court jurisdiction, either by express words or by necessary implication. The second section of the third article of the Constitution states that the judicial power shall extend, among other cases, "to controversies to which the United States shall be a party." This is undoubtedly a controversy to which the United States is a party. Under this grant of power Congress legislated at a very early day, and by the act of September 24th, 1789, commonly called the Judiciary Act, declared that the Circuit Court should have cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds the sum of $500, and the United States are plaintiffs or petitioners. This grant was undoubtedly prospective. At that time there was very little jurisdiction given by express enactment to the courts of the United States, and in fact this act created the courts of the United States, and by virtue of it the courts have, up to this time, cognizance of many cases.

So that this act was intended, whenever it occurred that a suit at law or in equity could be commenced, and the matter in dispute, exclusive of costs, amounted to the sum of $500, to allow the United States, as plaintiffs or petitioners, to bring it in the Circuit Court of the United States. Therefore, irrespective of the act of March 3, 1815, the effect of which it is not necessary for us here to consider, the only question is, whether this is, within the meaning of this statute, a suit of a civil nature at common law or in equity, and of the value of $500, and the United States are plaintiffs or petitioners. The value, of course, is greater than the amount indicated. The United States are petitioners, and thus two of the conditions of the statute are complied with. The only remaining condition is, is it a suit of a civil nature at common law or

in equity? It is contended that the act does not comprehend any other suit of a civil nature at common law or in equity, except such suits as were known at the time of its passage. If that is the true construction of the statute, then there might be some doubt whether the court would have jurisdiction. But that has not been the construction which has been given to the statute. For it must be now considered as the settled doctrine of the Supreme Court of the United States, that whenever any statute is passed which authorizes the commencement of a civil suit, and under which a suit can be maintained, that then, although it may not have been known in precisely that form to the common law, this statute vests in the Circuit Court jurisdiction of the case, and it comes within the meaning of the law, being a suit of a civil nature at common law or in equity. Take the case of an action brought on a bond; it may be that the action is of such a character that at common law it could not be maintained; but if the statute authorizes the maintenance of the action, then the act of 1789 vests in the court jurisdiction of the case, without any express words; and so liberal has been the construction given to this statute, in cases of even criminal procedure, where, by that act, the Circuit Courts have concurrent jurisdiction with the District Courts; and by subsequent legislation—as by the act of February 13, 1862,[1] the District Court, by the language of the statute, was alone clothed with jurisdiction of such cases; that the Supreme Court of the United States held that they could go back to the act of 1789, and sustain jurisdiction by virtue of that law in the Circuit Courts.[2]

A question in principle similar to the one arising in this case was discussed in a case cited at the argument, *Ex parte Biddle*, 2 Mason, 472. That was a proceeding by partition, confessedly existing only by virtue of the laws of Massachusetts, and the court uses this language: "Parties entitled to sue in

[1] 12 U. S. Statutes at Large, 339.

[2] *United States vs. Holliday*, 3 Wallace, 407.

the courts of the United States are, in general, entitled to pursue in such courts all the remedies for the vindication of their rights which the local laws of the state authorize to be pursued in its own courts."

This has been sanctioned by the Supreme Court of the United States, *Parsons vs. Bedford*, 3 Peters, 433, and we cite it for the purpose of showing what is the meaning of the words used in the act of 1789, "suits at common law." The court is commenting on an amendment to the Constitution proposed by Congress at its first session, where those words are used:

"When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By common law, they meant what the Constitution denominated in the third article 'law,' not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit," etc.

Now, it would follow, if this reasoning is correct, that the language in the 11th section of the act of 1789, "all suits of a civil nature at common law or in equity," is used in contradistinction to suits in admiralty, the exclusive jurisdiction of which was vested by the same act in the District Court, and also to criminal cases, jurisdiction of which was conferred by other sections. So that if this be true, and by a suit of a civil nature at common law or in equity is meant not the old and settled proceedings as recognized at common law or in equity, but suits in which legal rights are to be ascertained and determined, in contradistinction to cases in admiralty or criminal law, then this application is within the meaning of the 11th section of the act of 1789. It is a controversy to which the United States is a party and petitioner, and it is immaterial

for the purposes of jurisdiction whether the forms of proceeding are those in ancient use, for they may be changed by statute or moulded as a court of chancery will always mould the forms of proceedings to suit the exigencies of the case.

If it be a suit at common law, and the 7th amendment to the Constitution applies to it, then it is competent for the court to provide that there shall be a trial by jury. The fact that there must be a trial by jury can have no influence upon the question of the jurisdiction of the court, provided it is fairly deducible from the section itself to which reference has been made, because the court in various ways, either as a court at common law or a court exercising exceptional jurisdiction under statutes, can provide for the protection of the rights of the citizen, which that section giving trial by jury was intended to secure.

Again, what was the intention of the act of Congress and of the Legislature? Was it contemplated that there was to be no remedy under these acts? Did the act of Congress mean nothing when it said that the Secretary of the Treasury might purchase, at private sale or by condemnation, a site suitable for the public buildings, and when the Legislature said the United States might so purchase or condemn? How so purchase or condemn? The language of both statutes must necessarily be construed, and the words of the act of Congress are, "in pursuance of the statutes of Illinois;" it is in that way that it must be done. And there can be no doubt of the power of Congress to clothe the courts of the United States with authority to proceed in conformity with a particular statute of a state for the condemnation of property. The counsel who made the objection, and who argued the motion with zeal and ability, conceded that the United States had what is called the right of eminent domain; that is to say, that it was competent for the United States to condemn land for public use. However this may be, there can be no question of the right, when it is conferred, not only by an act of Congress, but by an act of the Legislature, both having the same general meaning and interest.

Then if this be so, it certainly was never supposed by the law-maker, either state or national, that acts were passed which had no operation or effect. There must be somewhere the right to proceed in conformity with these statutes to condemn land for the public use, and it must exist either by procedure in the state court or in the courts of the United States. It was insisted by counsel that there was no authority to proceed in the state court. If so, and there was no authority to proceed in the courts of the United States, then these acts were merely nugatory, having no sort of effect upon the question of condemnation. But it was intended there should be a proceeding either in the state court or in the courts of the United States. If in the state court, then the language of the 11th section of the act of 1789 applies: "The circuit court shall have original cognizance concurrent with the courts of the same states." So that, upon the whole, we can not doubt that it was the intention to give to some court jurisdiction of this proceeding; and whether it was the state or national court, is immaterial. By virtue of the 11th section of the act of 1789, jurisdiction is given, not by express language, but it follows as a necessary means to accomplish the ends which Congress had in view. But it is said that the language of the local law requires that the particular lot of ground shall be, in the first place, selected; and that has not been done by the Secretary of the Treasury.

In one sense that is true. It has not been located, but we apprehend that when the act of the Legislature was passed, authorizing the United States to purchase or condemn land, it meant in conformity with the law which was in force at the time. It will be recollected that the act of the 7th of March, 1872, recapitulated the act of the 4th of February, and at the time that this amendment was passed the act of Congress was in force, and this act of Congress did not make it compulsory upon the Secretary of the Treasury to take the land where he had commenced proceedings for condemnation. It gave him the option. The proceedings, therefore, must be instituted and carried on subject to the previous act of Congress, and subject

to the power of the Secretary of the Treasury to declare that he would not take a particular lot or tract of land at the price designated. And the discretion this act of Congress gave the Secretary of the Treasury has, as a matter of fact, been exercised already in the proceedings relative to the other block, and he has refused to take the property at the price fixed.

It is urged that this block has been obtained by purchase, and that the Secretary of the Treasury has stated to the owners of the land that the United States is willing to give a particular price. That may be, but by the terms of the law it is necessary that the United States should have complete title to the land, and the proceedings show that there are many incumbrances upon the land which confer rights which the owners have no authority in any way to interfere with. Parties have rights under contract with the owners of the block which even this act of Congress could not affect, and therefore, conceding that the Government has agreed to give for this block a particular price, still proceedings for condemnation were necessary in order to foreclose the rights of all the parties. If they had agreed to the price which the Government was willing to give them, there would be no necessity for the proceedings by condemnation. But they have not manifested that willingness, and even now, after the commissioners have fixed upon the price for each interest, they are not content. How much can they possibly get out of the Government? That is the question in all these cases.

Then it was indispensable, we think, in order that there should be a perfect title to the United States, that proceedings for condemnation should be initiated and should go on. Where so many interests are comprehended under the law, we do not see how it was possible to obtain title without proceedings for condemnation.

Some objection was taken to the *form* of the proceedings, on account of the technical phraseology of the act of Congress: "That the *Secretary of the Treasury* be, and he hereby is, authorized to purchase at private sale, or by condemnation, in

pursuance of the statute of Illinois," a particular tract of land. Now the Secretary of the Treasury is the mere officer of the Government, and when proceedings are instituted by him under this law, they become necessarily, from the very nature of the case, proceedings on the part of the United States, and the United States are the petitioners; and although the petition is filed by the district attorney, it is filed in the name of the United States, and for their benefit, and therefore it is within not only the spirit but the letter of the act of Congress. The owners resist the right of the United States to have this land at the price which the Government is willing to pay them for it. That is the controversy this court is called upon to determine, and we state in conclusion, that the principles which have several times been decided by the Supreme Court of the United States, are re-affirmed in a very recent case: *Railway Co. vs. Whitton*, 13 Wallace, 270. So that if it be conceded that the United States has the right of eminent domain to condemn land for public use, then, if there were nothing but the statutes of the state in force, there would seem to be not much question as to the jurisdiction of the court; but in connection with the act of Congress, there can be no room for doubt.

The motion to dismiss will, therefore, be overruled.

BLODGETT, J., concurring.

GOODALL, Assignee, etc., vs. TUTTLE.

District Court—Western District of Wisconsin—June, 1872.

In Bankruptcy.

RIGHT OF ASSIGNEE TO SUE IN ANY DISTRICT COURT.

1. A suit may be maintained by an assignee in bankruptcy to collect the assets of the bankrupt in any other District Court than that where the proceedings in bankruptcy are pending.

2. The right of the assignee to sue in the other District Courts is not expressly conferred, but it may be held to be included in and implied from the grant "to collect the assets," as that power could not be otherwise made effectual.

3. Jurisdiction over debtors of the bankrupt not being obtained by the bankruptcy proceedings, such power must, in order to give full effect thereto, necessarily be held to extend to any district where a suit to collect the assets is necessary.

4. It must be held that Congress intended to provide for the complete administration of the bankruptcy system in the Federal courts, and as authority to entertain such suits is not given to the Circuit Courts, it must exist in the District Courts, or the jurisdiction be radically defective.

5. The second section relates exclusively to the jurisdiction of the Circuit Courts under the act, and its provisions cannot, therefore, properly be referred to, to limit the jurisdiction of the District Courts conferred by the first section.

6. The rule that a legislature, by adopting a statute of another state, or re-enacting an old statute, is presumed to have adopted the judicial construction given thereto, considered and authorities referred to. Cases under the bankrupt act of 1841 cited and approved.

7. Congress not possessing the power to require or compel the state tribunals to entertain suits in favor of an assignee for the collection of the assets of the bankrupt, the courts should not construe the Bankrupt Act in such a manner as to necessitate in its execution assistance beyond the constitutional power of Congress to provide.

8. Numerous recent cases cited and examined.

Goodall, Assignee, etc., vs. Tuttle.

This was a suit by Ira E. Goodall, assignee of the Rock River Insurance Company, bankrupt, appointed by the District Court of the Eastern District of Wisconsin, where the bankruptcy proceedings were pending, against L. S. Tuttle, a resident of this district, to collect a debt claimed in favor of the bankrupt's estate, being a premium note given by the defendant for insurance issued to him.

The defendant filed a plea to the jurisdiction of the court.

This was one of a large number of similar suits, and was made a test case.

S. J. Todd, and *Finches, Lynde & Miller*, for assignee.

S. U. Pinney, and *M. M. Cothren*, for defendant.

HOPKINS, J.: The defendant claims that an assignee in bankruptcy cannot sue to collect the assets of the bankrupt, in any other district court than where the bankruptcy proceedings are pending. It presents a question upon which there exists some diversity of opinion among the district judges. I have therefore held it some time for examination.

As far as I have seen, *all* the cases reported under the bankrupt act of 1841, sustain the jurisdiction, while nearly all made or published under the present act, are against its existence; but what is very strange, reference is in only one of the decisions under the present act, made to the cases decided under the act of 1841, directly upon the question.

It may be regarded, therefore, as a kind of choice between old and new cases, but I do not propose to rest upon either without an examination of the reasons and principles upon which they are respectively based, and a careful examination of the provisions of the statute upon the subject of jurisdiction of the federal courts in bankruptcy proceedings, and in proceedings growing out of and in virtue of the bankruptcy proceedings. The district courts have no jurisdiction as between party and party of suits at law or in equity for the collection of the assets of the bankrupt, except what is

conferred by the bankrupt act, so if such jurisdiction is not conferred by that act, this court is unquestionably without jurisdiction in this and kindred cases.

The question of residence of the parties, which is material in civil cases under the general grant of jurisdiction to the federal courts, is not important here, for this court does not derive any power to act in this case under such authority or statutes. Congress is authorized by the Constitution "to establish uniform laws on the subject of bankruptcy throughout the United States."[1]

Whatever authority the district courts have in the premises is derived from the acts of Congress passed under that clause of the Constitution.

The power under that clause is sufficiently comprehensive to enable Congress to adopt a uniform system of bankruptcy, commit its administration to such of the courts of the United States as it might choose, and to provide the modes of procedure, special or otherwise, as they might, in their discretion, deem best adapted to secure and accomplish the objects of the act; and if such proceedings should differ from those in ordinary cases and suits, they would, notwithstanding, be obligatory upon the courts, as Congress has, by the Constitution, plenary authority over that subject.

By the Bankrupt Act of 1867, the jurisdiction and all the original jurisdiction created thereby, was conferred upon the several district courts of the United States, which, I think, and as is generally conceded, confers upon the district court where the proceedings are pending, the power to entertain suits of this kind. So that the question is not whether the act authorizes the assignee to sue in the ordinary mode as between party and party in *any* district court, but whether such right is confined to the district court where the bankruptcy proceedings are pending. Hence it becomes necessary to inquire by what provision the district court of the *same district* gets such

[1] Art. 1, sec. 8, subdivision 5.

jurisdiction, and, if it is found to exist, then to see by what clause it is restricted to that district.

I do not understand it to be claimed that the act expressly grants such jurisdiction, but only that it results from the authority given to the courts to adjudicate upon, collect the assets of, and to administer and distribute the estate of the bankrupt. The grant of jurisdiction to collect the assets, it is assumed, impliedly confers upon the courts, in the absence of any provision prescribing the manner of carrying into effect such jurisdiction, the right to adopt such form of proceeding as may be necessary and appropriate to give practical efficiency to such grant. This is a universal rule of construction, and without such a rule many rights would go unredressed, for it is not unusual for legislative bodies to leave with the courts the power to devise and adopt a remedy commensurate with the exigencies of the case in the execution of the authority conferred, the restrictions being that they must not be such as are in violation of the provisions of the fundamental law, or in derogation of the constitutional rights of the citizen.

As I have before said, the right to proceed in the district court by the ordinary and plenary modes of actions at law or in equity, as between party and party, is not expressly conferred in the act, but as stated by CHASE, Ch. J., *In re Alexander*, 3 Bankrupt Register, 6, "This jurisdiction may be well enough held to be included in the general grant of the first section."

It is important to bear this in mind, as it may assist in a settlement of the difficulties that have been encountered on this question of jurisdiction of the district courts.

The second section does not profess or attempt to confer or regulate the jurisdiction of the district courts. That relates exclusively to the circuit court. But it may with propriety be said to *assume* the existence of this jurisdiction in the district courts. That section clothes the circuit court with *concurrent* jurisdiction with the district court in certain (not all) cases arising under the act, but not of the character of this case, so it is not necessary to define or discuss its extent or

meaning. I say by that section, Congress *assumed* the jurisdiction of the district court in all cases, and that it was conferred by section one, for if it is not found in that it does not exist.

And in that assumption there is a very clear legislative construction of the extent and meaning of section one.

To be more specific than Chief Justice CHASE, I think it may well be held to be included in the express and general power "*to the collection of all the assets of the bankrupt.*" And as no special mode is provided for carrying out or exercising that power, it is to be presumed, as before stated, that Congress intended the courts would, according to their usual practice in such cases, adopt the customary and common mode of practice provided for the collection of debts or the recovery of property in other cases—that is to bring an action either at law or in equity, according to the nature of the case.

But, as before stated, the right to maintain suits of this kind in the district where the proceedings are pending, is not questioned—only the right to sue in any other district.

In the solution of that question, it may be profitable to examine and see, if possible, why the right was given the assignee to sue for the collection of the debts *only* in such district. The debts and assets of every nature, situated in all districts, pass to and vest in the assignee, as much as those situated in the district of his appointment. It is his duty to collect the debts from parties *out* of his district, and to take possession of property out of his district and convert it into money, as much as that within it. Why restrict his right to sue in the district court to the district where he was appointed? If the interests of the estate might be promoted by allowing the assignee to sue in the district court appointing him, is that consideration any less potent as applied to his right to sue in other district courts? Do not the same reasons that exist for authorizing him to sue in one district court exist and apply equally to the right to sue in any and all districts? I suggest

these questions to see if any reason can be assigned for the distinction attempted to be sustained.

It is said by one learned judge that the assignee is not remediless; that he can sue in the state courts. Suppose that to be so, can he not sue also in the state courts *within* the district of his appointment? That being so, it furnishes no reason for any such distinction.

I assume, therefore, that no satisfactory or plausible reason can be assigned for allowing the assignee to sue for the collection of the assets in the district court appointing him, that does not apply, with equal force, in favor of his right to sue in any other district; and if no reason for such distinction can be assigned, why impute to Congress an intention to create one? But it is said that the first section so limits it. I think I have shown that it does not; that in terms it does not give the right to maintain a suit in any district court, but that such right only exists by implication, as being fairly within the intention of Congress, and as necessarily attaching to the district courts to collect the assets. Is it to be inferred as extending to that district as a necessity to the due administration of the laws? That cannot be upheld, for I have shown that if the assignee can sue in the state courts to collect the assets in one district he can in another, and thus through the agency of those courts collect all the assets—those authorized by the second section of the act to be sued for in the circuit court, as well as the common debts that cannot be sued for in the circuit court. So I say again there is no necessity for holding that the assignee may sue for assets in the district court appointing him, and not in any other.

There is nothing in the act that requires it, and as there is no reason for making such distinction, I do not think courts should establish such an one. The act provides "that the jurisdiction hereby conferred shall extend to the collection of *all* the assets." If any portion of the assets were out of the district, how were they to be collected? In one of two ways; either by process issuing from that district court, to the

defendants residing in any district, or by allowing suit to be brought in the district court where the defendant might reside. To collect *all* the assets, one of those modes would have to be adopted. It is very plain, I think, that the general rule which prohibits the suing a party out of the district where he resides, was not changed. So it must have been supposed by Congress that suits could, under that general power, be brought in any district court. But it is said that the first section confers jurisdiction "on the district courts in their respective districts," that that is the extent also of the "original jurisdiction" conferred. I think too much importance is given that expression. There are certain proceedings that the bankrupt courts can only do in the district where the proceedings are pending—such as the adjudication of bankruptcy; that could only be done by the court where the proceedings were pending if those words were omitted; so also of all that class of cases and proceedings relating to the regularity of the bankrupt proceedings proper, including controversies between the bankrupt and his creditors, the ascertainment of liens on bankrupts' property, and the priority thereof, down to the distribution of the assets and the discharge of the bankrupt. These and like questions must all necessarily be heard by the court before which the bankruptcy proceedings are pending. None of those matters could be tried or heard in the state courts or any other court, so that limitation in the act as to such matters, does not appear to possess much significance, as the same construction would have to be given to the act if it had been left out.

But the act provides for things and acts to be done that affect and relate to *third* persons; acts which do not in any sense require the presence of the records of the case or proceedings; acts and proceedings which it is contended can be transacted and taken in the state courts, to-wit: suits for the collection of the assets against delinquent debtors. Should the limitation be held as applicable to such cases? As before stated, the right to collect *all* the assets is one of the express grants conferred by the act upon the district court, and if

Congress had intended to confine the right of the assignee to prosecute suits to the district court of the district appointing him, it seems to me they would have expressed such limitation in unequivocal language, and made some other provisions for the collection of debts from parties living outside of that district.

But the act contains this further general authority, "to do all acts, matters and things to be done under and "in virtue of the bankrupt proceedings," without any words of limitation or restriction as to courts. Did not Congress intend by that, that all proceedings *necessary* to be done in virtue of the bankruptcy should be done in the federal courts? Suits against third parties to collect the debts and to collect the assets generally, are not such suits included in the general terms as proceedings in virtue of the bankruptcy? Can it be maintained from any thing in the act, that Congress intended to leave the collection of the debts or any part of the assets to the agency of the state courts, or that they intended to rely upon the instrumentality of any other courts than those of federal origin for a complete administration of the laws? If not, then why construe it so as to necessitate the employment of such agencies? Why give a construction that defeats the manifest intention of Congress in that respect? Courts are not authorized to *create* a limitation by construction; that is in contravention of the intention of the law makers.[1]

The system adopted and established by Congress should be administered by the courts charged with that responsibility, according to its true spirit, intent and meaning, instead of their attempting to escape therefrom by a narrow and technical interpretation of the language, without regard to the obvious purport of the whole act.

My conclusions, therefore, are, that Congress, under the power contained in the Constitution, by the act of 1867 established a uniform system of bankruptcy; and in it they

[1] *Dresser vs. Brooks*, 3 Barbour, 429.

attempted and intended to confide its administration to the federal courts, and for that purpose they conferred *original jurisdiction* upon the several district courts of the United States within their respective districts, to adjudicate upon the question of the bankruptcy, to hear all matters relating to the bankruptcy, and all questions arising between the bankrupt and his creditors, authorizing this jurisdiction to be exercised in vacation as well as in term time, and authorized a review of all such proceedings in the circuit court of the district where the proceedings were pending, by petition or otherwise, and empowered the circuit court to hear those matters in vacation or term time; that the exercise of the jurisdiction thus far was meet and proper to be had in the district court where the papers were filed and not in any other district.

The act further confers the power upon the district courts to collect all the assets of the bankrupt, and to do all other acts necessary to be done in virtue of the bankruptcy.

This by implication confers the authority upon the district courts to entertain jurisdiction of *suits* in the name of the assignee against third persons, either at law or in equity, for the collection of the debts and property of the bankrupt, and as such jurisdiction is not expressly limited to the district courts where the proceedings are pending, and as no reason exists for such limitation, the courts are not warranted in restricting its exercise to such district.

I have not undertaken to define with accuracy the character or extent of the jurisdiction of the circuit courts under the second section, as I do not see that that section sheds any light upon the jurisdiction of the district courts as conferred by section one.

The eighth section, by allowing appeals from decrees and writs of error from judgments of the district courts to the circuit courts, assumes that the district courts have jurisdiction of *suits* at law and in equity, and there is nothing in that section that indicates, or from which it may be inferred, that it is restricted to any particular district or class of cases. It may

be applicable to and include all cases without exception, and the language is as consistent with its existence in each district as in the district where the proceedings are pending.

The judges holding that an assignee cannot sue in any district court other than where he was appointed, also hold, (and correctly, too, I think,) that a party cannot be sued outside of the district where he resides or is found, or in other words that jurisdiction in that respect is not enlarged; so that by their own construction they convict Congress of the folly of establishing a system of bankruptcy without providing the means for its execution within their own jurisdiction. Such a construction is as destructive of the *uniformity* of the system they are empowered to establish as it is subversive of their intentions.

The jurisdiction that may be exercised in vacation is entirely different from that for the collection of debts or assets.

By the proceedings and adjudication, jurisdiction is obtained of the bankrupt and his creditors, and the court making the adjudication is the only one, according to the well settled rules of all courts, that can deal with the bankrupt and his creditors, and settle all conflicting claims, equities and controversies arising between them. All such matters are *exclusively* within the jurisdiction of the court where the proceedings are pending, and such parties may proceed *summarily* to have their rights heard and determined by such court.

It has been held that persons or creditors holding claims upon the property of the bankrupt, in the possession of the assignee, may proceed summarily by petition as *against* the assignee,[1] while the assignee, to collect the debts or to recover property claimed adversely, must proceed by action at law or in equity. The reason for such distinction is obvious. As I have already attempted to show, jurisdiction over the debtors and adverse claimants is not obtained by the bankruptcy proceedings, they cannot be treated as parties to the proceeding

[1] *Ferguson vs. Peckham*, 6 Bankrupt Register, 509.

like creditors. That being so, the power to collect the assets was necessarily additional—an independent authority given to the district courts, not to be exercised at chambers, like their other powers, but in the usual and formal manner that courts proceed in common law and equity cases. This is the jurisdiction that I have endeavored to show may be held as impliedly conferred by the first section, and which is recognized by the second and eighth sections, and which, according to my understanding of the act, pertains to each district court, and authorizes an assignee in bankruptcy to sue for the collection of the assets in any district court where it may be necessary to effect such collections. This conclusion is at variance with the decisions of some of the district courts, but I think I am sustained in it by the weight of authority as well as by sound reason.

I cannot but be impressed with the idea that due consideration has not been given to the authority of decisions made under the act of 1841, sections six and eight of which correspond in substance with sections one and two of the present act, except that some additional powers are expressly conferred by the present. They are the sections which confer jurisdiction, and it becomes, therefore, of the first importance to ascertain what construction had been given and placed upon those sections concerning the question of jurisdiction, before the passage of the present act, for as Congress subsequently re-enacted the law, it is to be presumed that they did so in view of the construction given to it and in affirmation thereof.

This rule is universally applied in the construction of re-enacted statutes.[1] If, therefore, the courts had interpreted the corresponding sections in the act of 1841, as giving the authority for the assignee to sue in other district courts than where the proceedings were pending, under the rule above stated, such interpretation is absolutely binding upon the courts. Such decisions have not only the weight that the eminent legal

[1] Sedgwick on Statutory and Constitutional Law, 428–431.

attainments and ability of the judges pronouncing them gave to them, but in addition thereto is the presumption that Congress approved and sanctioned them, which, it seems to me, the courts should regard as of about the same effect as if such construction had been incorporated into the act.

The Bankrupt Act of 1841 expressly allowed certain jurisdiction to be exercised summarily, which, under the present act, the Supreme Court, in *Smith vs. Mason*, 6 Bankrupt Register, 1,[1] has decided is not the case. It is there settled that when the party sued is a stranger to the proceedings, he must be proceeded against in the formal mode as used in common law or equity cases. In *Ex parte Christy*, 3 Howard, page 312, Judge STORY, from whose opinion a part of the special grants of jurisdiction in the present act are copied, says: "The obvious design of the Bankrupt Act of 1841, ch. 9, was to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period. For this purpose it was indispensable that an *entire* system adequate to that end should be provided by Congress, capable of being *worked out through the instrumentality of its own courts independently of all aid and assistance from any other tribunals over which it could exercise no effectual control.*"

Again, at page 320 he says: "The judicial power of the United States is, by the Constitution, competent to all such purposes; and Congress by the act intended to secure the complete administration of the whole system in its own courts, as it constitutionally might do."

And further, at page 321, he says: "The truth is (as has been already asserted) that in no other way could the bankrupt system be put into operation without interminable doubts, controversies, embarrassments and difficulties, or in such a manner as to achieve the true end and design thereof."

[1] Also 14 Wallace, 419; consult also *Marshall vs. Knox*, recently decided by the Supreme Court, and reported in American Law Register, October, 1873, p. 630. [*Reporter.*

From these general views of the reasons and principles involved in and underlying the act and the objects to be attained by it, and the modes and tribunals for its administration, no intelligent party, I think I may safely assert, will dissent, but it is true that the *precise point* involved in this case was not before the court, but there were others relating to the general powers of the district courts under the act which called for an examination and ascertainment of the jurisdiction conferred by the act, and made the remarks above quoted pertinent to that case and to the question now before this court.

The same learned Judge, in *Mitchell vs. Great Works Milling Co.*, 2 Story, C. C. R., 648, the case of a bill in equity filed in the *Circuit Court* by an assignee in bankruptcy, which was demurred to on the ground that the circuit court had no jurisdiction under the act of 1841, again examines and explains the law, and its various provisions relative to the jurisdiction conferred on the federal courts. He overruled the demurrer and sustained the jurisdiction. He there showed, by a very able and exhaustive argument, that Congress contemplated by the provisions conferring jurisdiction, to give the *entire* administration of the law to the federal courts, and did not contemplate the aid of the state courts, and said: "It is clear that Congress has no right to require that the state courts shall entertain suits for such objects and purposes. The states, in providing their own judicial tribunals, have a right to limit, control and restrict their judicial functions and jurisdiction according to their own mere pleasure. They may refuse to allow suits to be brought there 'arising under the laws of the United States,' for many just reasons; first, because Congress is bound to provide such tribunals for themselves; second, state courts are not subject to the legislation of Congress, as to their jurisdiction," continuing the argument to show that the law, if it depended upon state tribunals for its execution, could not be administered. A bankrupt law, to be constitutional, must be *uniform* throughout the whole United States. That includes *uniformity in administration*, which it would

be impossible to attain if it were entrusted to the state courts. Some might hold one provision unconstitutional, and some another, in a way to render the administration of it impossible. In no way, therefore, except by committing the administration of it to the federal courts, could it be made "uniform."

Justice McLEAN, in *McLean vs. La Fayette Bank*, 3 McLean, 190, says: "This power (bankruptcy jurisdiction) cannot be exercised by the state courts. Their powers are derived from different sovereignties, to which they are amenable. *Congress had not the power to impose this jurisdiction on the state courts.*" Judge STORY, in *Ex parte Martin*, 5 Law Reporter, 158, had the question before him as to whether the federal courts in districts *other* than where the proceedings were pending had jurisdiction to restrain the proceedings by creditors, or to prevent parties from interfering with the bankrupt's property in such districts. After quoting the following language of the act as to the extent of the jurisdiction "to all acts, matters and things to be done under and in virtue of the bankruptcy until the final distribution and settlement," which is the same language used in the present act, he says:

"Now, this language is exceedingly broad and general, and it is not, in terms or by fair implication, necessarily confined to cases of bankruptcy originally instituted and pending in the particular district court where the relief is sought. On the contrary, it is not unnatural to presume that as cases originally instituted and pending in one district may apply to and reach persons and property situate in other districts, and require auxiliary proceedings there to perfect and accomplish the objects of the act, the intention of Congress was that the district courts in every district should be mutually auxiliary to each other for such purposes and proceedings. The language of the act is sufficiently comprehensive to cover such cases."

He further says:

"No state court could entertain the suit, for the act confers no power or jurisdiction on any state court."

In *Moore vs. Jones*, in District Court of Vermont, reported

in 23 Vermont, 739, which was a proceeding by an assignee to collect a sum of money received by a party contrary to the provisions of the bankrupt act, Judge PRENTISS says: "Jones was decreed a bankrupt, not in this court, but in the District Court of the *Northern District of New York*, and the question is, whether, that being the case, this court can take jurisdiction of the matter in controversy, or, indeed, of any matter arising under or growing out of the bankruptcy." It will be seen that that case presents the identical question involved in this, and Judge PRENTISS, on the authority of *Ex parte Martin*, *supra*, sustained the jurisdiction. The only question presented in that case was as to the jurisdiction of the District Court of Vermont, and the decision sustaining it in that case is a direct authority in favor of the jurisdiction of this court in this case.

These are all the cases I have been able to find upon this question, reported under the act of 1841, and I have taken the liberty to quote freely from them, to elucidate and establish my own views by the reasons and opinions of those enlightened courts, and for the further purpose of showing the direct bearing and application of the well settled rule before referred to, that a legislature, by reënacting a statute which has received a construction from the courts, is presumed to have adopted the construction as well as the act itself—as stated in *Pennock vs. Dialogue*, 2 Peters 1: "The known and settled construction of these statutes by courts of law has been considered as silently incorporated into the acts, (on their reënactment), or has been received with all the weight of authority." The same rule has been applied to constitutional provisions copied from other states. Their judicial construction is held to have been also adopted.[1]

Now the courts having construed the act of 1841, which contained similar, though not as extensive, grants of jurisdiction as the present act, as not restricting the proceedings for the collection of the assets of the bankrupt to the district

[1] *Attorney General vs. Burnet*, 2 Wisconsin, 791.

court where the proceedings were pending, and having so uniformly and emphatically held that the intention of Congress was that the act should be administered in the federal courts, and that they could not constitutionally impose the execution of the act upon the state courts, and Congress having, with full knowledge of such uniform interpretation, re-enacted the law, how can the courts escape from the application and obligation of the above rule? Is not that construction to be regarded as "incorporated into the act," and as binding upon the courts as the act itself? It seems to me it must be so, and that there is no way of escape from it. But without regarding that as absolutely controlling, I think the general and universal rules for the construction of statutes sustain such interpretation.

In *United States vs. Freeman*, 3 Howard, 565, the court, after citing various cases as different illustrations of the rule, say: "The meaning of the legislature may be extended beyond the precise words used in the law, *from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed*, the limitation of the rule being, that to extend the meaning to any case not included in the words, the case must be shown to come within the *same reason* upon which the law-maker proceeded." Does not the "same reason" exist for allowing an assignee to sue for the recovery of the bankrupt's estate in the district court of every district where the estate is situated, as exists for allowing him to sue in the district where the proceedings are pending? If so, is it not manifestly the duty of the courts under that rule to place such a construction upon the act as to effectually carry out the intention of the law-makers? In *The People vs. Utica Insurance Company*, 15 Johnson, 381, the court say: "Such construction ought to be put upon a statute as may best answer the intention which the makers had in view, and this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances; and whenever such intention can be discovered, it ought to be followed with reason and discretion in the construction of the

statute, although such construction seem contrary to the letter of the statute; where any words are obscure or doutful, the intention of the legislature is to be resorted to, in order to find the meaning of the words. *A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter;* and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers, and such construction ought to be put upon it as does not suffer it to be eluded."[1]

Again in Dwarris' on Statutes, 690, it is said, "The intention is to govern, though such construction may not in all respects agree with the letter." "That the meaning of words is best ascertained from the subject of the act," 696. "That the reason and object are a clue to the true meaning." Of course these rules are to be considered applicable only in cases where there is some ambiguity in the language, or the language is such as to leave some doubt as to the limitations of the act. When the words of an act are perfectly clear it needs no interpretation. But I think after the amount of discussion these jurisdictional clauses have occasioned, both under the old and the present act, that it will not be claimed or alleged that they are not sufficiently ambiguous to require interpretation.

I will now briefly examine the cases decided under the present act, and will endeavor to show that those which conflict with the interpretation sought to be maintained by me are in reality but two. The first case in which the question was raised or is noticed was *In re Richardson*, 2 Bankrupt Register, 74. That was a bill brought by a bankrupt (residing in New Orleans) in the Southern District of New York, to enjoin his creditors from prosecuting their claims against him in New York, which was

[1] 6 Bacon's Abridgement, statutes 1, 5, 10, and authorities there cited; 1 Kent's Commentaries, 462; *Dresser vs. Brooks*, 3 Barbour, 429; *Jackson vs. Collins*, 3 Cowen, 89; *The King vs. Younger*, 5 Term Reports, 449; *Margate Pier Company vs. Hannam*, 3 Barnewall & Alderson, 266; *Wilkinson vs. Leland*, 2 Peters, 627.

dismissed for want of jurisdiction. It may be very reasonably claimed that the district court of Louisiana had *exclusive* jurisdiction of the matter involved therein, and that the court in the Southern District of New York could not grant the relief asked. A state court for that reason could not grant the relief sought in that case, any more than the district court. The court in Louisiana acquired jurisdiction, as I have heretofore shown, of the bankrupt and of all his creditors, and might, perhaps, be said to be exclusively the tribunal to adjust all matters between them, and upon that ground it might properly have been dismissed. But the Louisiana court did not, as hereinbefore stated, get jurisdiction, by the proceedings in bankruptcy there, either of the bankrupt's debtors, or of persons holding his property by adverse claims. A new proceeding in favor of the assignee would be necessary even in that court, in order to get jurisdiction of them—*i. e.*, by the service of process as in ordinary suits at law or equity; so the question as to whether *such* a suit might not have been maintained in New York was not before the court. I regard what was said, therefore, as not said in reference to the question now under consideration, and as not binding, nor entitled to the consideration of a decision made upon the point presented in this case. I am not prepared to say that that case was not properly dismissed, but upon other grounds and for other reasons than exist in this case. The next case in order of time was the case of *Markson vs. Heaney*, in the United States Circuit Court of Minnesota, 4 Bankrupt Register, 165. That was the case of a bill filed by an assignee, appointed in Kansas, against a party in Minnesota to restrain the foreclosure of a mortgage given by the bankrupt upon property situated in Indiana. The opinion is delivered by DILLON, Judge. The question, he says, was not raised by either party in the argument, and he says at its conclusion, "I therefore express my first impressions concerning it." I do nor consider that as the final and deliberate opinion of the learned judge on the question, and think he would not feel bound by it himself as such. The question there, however,

was only as to the jurisdiction of the *Circuit Court* under the second section of the act, and he did not attempt to define the extent of the jurisdiction of district courts as conferred by the first section, nor does he refer to the opinions under the former act upon the question that I have cited, nor to any case except that of *In re Richardson, supra;* so I am satisfied that it should be received as only the "first impression" of the learned judge, formed without argument or deliberate consideration.

The next case is *Sherman vs. Bingham*, 5 Bankrupt Register, 34. That presents the identical point involved in this case, and it was ruled that the court had not the jurisdiction. Judge LOWELL referred to, but declined to follow, the opinion of Judge STORY in *Ex parte Martin*, as well as that of Judge PRENTISS, in *Moore vs. Jones*, though he says the difference between the two acts is hardly to be distinguished. In *Dwight vs. Ames*, 2 Bankrupt Register, 147, the same Judge says that section one of the present act is identical with section six of act of 1841, except the present *goes further and adds some new powers*, which he enumerates, and among which is the express power to *collect assets*. He adopts the views of the Judges in *In re Richardson* and *Markson vs. Heaney*, above cited. He does not seem to recognize any difference between the jurisdiction conferred upon the circuit courts and the district courts, and treated the question upon the theory that the jurisdiction granted by the first section *did not relate to suits at law or in equity between the assignee and third persons* "that," as he says, "being regulated by section two."

This is the point of difference, and if he is correct, a suit cannot be brought in *any district court*, not even the *one where proceedings are pending* for the recovery of a *debt* due the bankrupt, for the jurisdiction conferred by the second section relates only "to suits at law or in equity, which may or shall be brought by the assignee *against* any person claiming an adverse interest, or by such person against such assignee *touching any property or rights of property* of said bankrupt transferred to or vested in such assignee." That jurisdiction

is limited to the subject matter stated, and to persons setting up adverse claims thereto.[1] That does not authorize either the circuit or district courts of any district to entertain suits by the assignee to collect *debts* due to the bankrupt's estate. Such suits cannot be maintained in the circuit courts, as held in *Woods vs. Forsythe*, 2 Western Jurist, 348; and if suits for the collection of debts cannot be maintained in the circuit courts under the jurisdiction thereby conferred, they cannot be in the district courts, if they derive their power to entertain such suits at law only under that section, for the jurisdiction conferred by that is only *concurrent;* so, according to the construction of the learned judge, a suit to collect a *debt* is not maintainable in *any district court*, and there is, therefore, no need of distinguishing between districts. But he evidently does not mean that, for he says, "*the true meaning of the law is that I have jurisdiction of such actions as this only when the bankruptcy is here.*" But where does he get such jurisdiction from, if section one does not relate to suits at law or in equity between the assignee and third persons? If the jurisdiction exists it is by virtue of the powers granted by section one. It is provided in that section that the "jurisdiction hereby conferred shall extend to the collection of *all* the assets of the bankrupt." I do not think that Congress intended by that, that debts were to be collected only by *moral suasion.* If not, what other way is there to collect them than by *action* commenced by due process of law, where debtors do not voluntarily pay, and when the law makers confer the power to collect they necessarily include the right to do it by due process of law. The learned judge has failed to satisfy me, notwithstanding his opinion is carefully prepared, and ably sustains his theory that he has arrived at the true meaning of the act. Nor do I think he answers or explains away the positions and argument of Judge STORY, on the same point. I think he was not entirely satisfied with its soundness himself, for he says he

[1] *Morgan vs. Thornhill*, 5 Bankrupt Register, 1.

should not regret to see the decision *overruled*, because of the inconvenience that might result from it in the administration of the act. His theory about using the state tribunals in aid of the administration of the act I have shown to be questionable under the constitutional power of Congress, and practically very uncertain, as the state might at any time deny the right to the use of their tribunals in such cases, and neither Congress or the federal courts could prevent it. But as to whether suits to collect the assets can be maintained in the state courts, I am not called upon now to express an opinion. All I have meant to say is that Congress cannot *impose* that duty upon them. He refers, in support of his position, to the eleventh section, which provides that proceedings in bankruptcy must be commenced in the district where the bankrupt resides. That fixes the *venue* for commencing the proceedings *in bankruptcy*, and prescribes the contents of the process for acquiring jurisdiction of the proper parties to the bankruptcy proceedings, but it does not require *all* the acts and proceedings, necessary to be done or taken "in virtue of the bankruptcy," such as suits at law or in equity, to be prosecuted in that district. If it had been so intended, it would doubtless have authorized the issuing of process from that district to the marshal of any and every district where a necessary defendant in such suits might reside, so as to bring him into that court. Section seven of the act of 1841 provided "that all proceedings in the case to *the close thereof*" should be had in the district where the bankrupt resides. Yet Judges STORY and PRENTISS made the decisions I have before mentioned without referring to it at all. That was not, however, re-enacted. But it is evident that section eleven relates to the proceedings against the bankrupt, the action, orders and directions of the court in the bankruptcy proceedings proper, and not to suits against third persons growing out of the proceedings; so that it ought not to have any influence in determining the questions involved in this case. I have shown, I think, that the reasoning of the learned judge goes too far—does not stop when he does. It goes to

show that Congress has failed to confer jurisdiction upon any federal court to entertain a suit for the collection of the *debts* due the bankrupt's estate, so that the question of distinction attempted to be sustained between the authority of the different districts is wholly immaterial.

Judge NIXON, of the New Jersey District Court, has adopted Judge LOWELL'S views, and held in *Jobbins vs. Montague*, 6 Bankrupt Register, 509, that a suit in equity cannot be maintained in a district court other than where the bankruptcy proceedings are pending. That was a suit of the class of which a circuit court has concurrent jurisdiction under section two. The learned judge, in stating his own reasons, confines himself principally to two phrases in the first section: first, that the original jurisdiction conferred is "given to the district courts *in their respective districts* in bankruptcy proceedings;" and, second, that such courts "are authorized to adjudicate, etc., according to the provisions of the bankrupt act." It occurs to me that he attaches undue weight to those phrases. It seems to me if they were both omitted the sense of the section would not be materially changed; for the district courts cannot, by any law that I know of, exercise jurisdiction *out of* their respective districts. Their jurisdiction is and always has been restricted to the territorial limits of the district.

And if the second phrase was omitted, could the courts exercise the jurisdiction in any other way than "according to the provisions of the act?"

Are not the provisions of the act as binding upon the courts without that clause as with it?

My understanding is that the courts are bound by the provisions of all acts of Congress, and that a declaration in the act that they are to be governed by them, would not in the least change the obligation or action of the court in respect to the law. As an instance of the obligatory operation of that clause he also cites the eleventh section, which provides where proceedings shall be commenced. If that phrase was omitted altogether, could the proceedings be commenced in any other

district than that provided in section 11? He also suggests as warranting the strict construction that he seems to understand he is giving to the act, that "the bankruptcy courts are mere creatures of the statute." It seems to me that his views in that respect do not accord with the general principles, purposes, and theory of the system.

Congress is authorized by the Constitution to adopt a uniform system of bankruptcy, which it has done, and clothed the several district courts with *original jurisdiction* to administer it. Now to hold that the powers of such courts are to receive a *strict* construction is not, it seems to me, according to the generally received doctrine of courts in such cases. Such an act is properly denominated *remedial*, and should therefore receive a generous and liberal interpretation, which embraces and extends to the provisions conferring upon the courts jurisdiction to execute it, as well as to the other parts. Would the learned judge apply that construction to the district court when sitting in admiralty? If not, why? It is constituted a court of admiralty by *statute*, and is a *creature* of the statute in the same sense that it is when sitting in bankruptcy. He also undertakes to draw support for his restricted meaning from the language of the second section. I have hereinbefore attempted to show that no such use could be made of section two; that that section relates to the proceedings in, and the jurisdiction to be exercised by, the circuit courts, and does not profess to regulate or interfere with the jurisdiction of the district courts, and like Judge LOWELL, he also deplores the construction that he feels constrained to place upon the act, as he anticipates that embarrassments may result therefrom in its administration.

I avoid all such regrets and doubtful apprehensions by simply following the construction placed upon the act of 1841 by Justice STORY, and which, I am more and more convinced, was approved by Congress, as in preparing the present act they copied into it from his opinions several of the clauses in reference to the extent of the jurisdiction of the district courts, and

particularly the one "to the collection of *all* the assets of the bankrupt;" so that Congress must, as a question of fact, not merely presumption, have been familiar with his opinions upon that subject, and also with the opinions that Congress did not possess the power to cast upon the state courts the duty or authority to execute any part of the act.

Judge MILLER, of the Eastern District of this state, has repeatedly decided that the district courts have jurisdiction in cases exactly like this; that the general clause or grant of authority to collect the assets does not refer alone to the court where the bankruptcy proceedings are pending, but to the district courts generally, and authorizes the assignee to sue in any district court; that such cases may be said to be cases arising under the laws of the United States and within the judicial power as declared by the Constitution of the United States.

It was suggested by the counsel for the defendant on the argument, that as the bankruptcy proceedings, out of which this case arises, were by the act dividing this state into two districts and organizing this district, declared to remain in the eastern district, and that as by that act jurisdiction, in all unfinished cases, was *retained* in that district, the assignee might commence suits in that court against parties residing in this district.

I do not think that position can be sustained, for according to my theory of the act, which I have hereinbefore attempted to maintain, a *suit* against a *third* person for the collection of the assets, is not a proceeding in the bankruptcy case proper. That, although it may be said that such suits grow out of it, or are "acts done in virtue of the bankruptcy," yet they are not a part of the proceedings, so as to authorize the prosecution of such suits in that district.

The bankrupt and his creditors are required to attend to the case in that court, as they are regarded as parties to those proceedings, and all orders touching their rights and the administration of the estate can *alone* be made there, but that cannot

include suits at law or in equity against third parties that are required subsequently to be brought for the collection of the assets.

Such a course would be contradictory of and antagonistic to the theory and general purposes of the law, as I have heretofore explained it, and would be very unjust to the defendant in this suit, and other defendants in various other cases now pending herein, as it would subject them to largely increased costs without any corresponding benefit. This being an action by the assignee of a bankrupt mutual insurance company to collect the premium note given by the defendant, a member of the company, it was not of such a character, or for such an amount as predisposed my mind to a favorable disposition of the case for the plaintiff, and I would gladly have turned the plaintiff over to proceed in some of the inferior tribunals of the state to collect this class of debts, but I could not see that I had any right to do so under the law. Such matters cannot be taken into consideration legitimately, however, in construing an act or as changing an otherwise correct construction.

I think the interpretation I have adopted is in harmony with the general spirit of the act, and gives to it its proper scope and efficiency, and it certainly has the support and concurrence of many of the most learned and distinguished judges of the federal courts, from whose opinions on the subject I have hereinbefore liberally quoted.

In the result finally reached, I have designed giving to the act its most natural and obvious meaning, and have only drawn such inferences therefrom as are sanctioned by the known and accepted rules governing the interpretation of statutes in like cases. I therefore direct a judgment for the plaintiff.

NELSON vs. CITY OF MADISON.

CIRCUIT COURT—WESTERN DISTRICT OF WISCONSIN—JUNE TERM, 1872.

IN EQUITY.

DEDICATION IN WISCONSIN.

1. DEDICATION BY PLATTING.—The owner of land, or his authorized agent, can plat and lay out a town so as to pass to the public the perpetual use of portions of the land for streets and public grounds, and when such plat is made out, acknowledged and recorded in conformity with the statute, it operates as a sufficient conveyance of the streets and public grounds to the public use.

2. PLAT RECORDED IN WRONG COUNTY.—A plat made out and recorded in a different county from where the land is situate does not operate as a dedication.

3. PLAT MUST BE BY OWNER.—The plat must be made by the person who owns the land at the time it is made, or his authorized agent, and in order to devest the title of the proprietor, the formalities prescribed in the statute are essential.

4. Deeds referring to a plat, but given before the grantor acquired title, do not bind him as an act of dedication.

5. But an unequivocal recognition of the map after purchase would operate as an affirmance of the original intention of dedication and give it full force and effect.

6. EVIDENCE OF DEDICATION BY PRESCRIPTION.—Though dedication may be established by user for a period of twenty years, such user, in order to constitute a dedication by prescription, must have been adverse under some real or pretended claim or right, and exclusive. In the absence of proof to the contrary, the presumption is that the user was permissive.

7. Various decisions of the Supreme Court of Wisconsin and of the United States cited and commented on, this court following the latter.

8. Circumstances constituting a dedication—effect of user and acquiescence.

Nelson vs. City of Madison.

This was a bill filed by the complainants, claiming to be owners in fee of certain real estate in the city of Madison, to restrain the city from taking possession of or using them.

The facts appear in the opinion.

Gregory & Pinney, and *S. U. Pinney*, for complainants.

J. C. Ford, and *H. S. Orton*, for defendant.

HOPKINS, J.: The bill in this case is filed to restrain the defendant from proceeding forcibly to remove a fence erected around a piece of ground situated in the city of Madison, and claimed by the complainants as lots one, two, three and four, block 272. It is alleged in the bill that the complainants placed such fence around the lots to enclose them, and that the defendant has ordered its police officers to remove it. The complainants charge that they own the lots in fee, and ask a perpetual injunction to restrain the defendant from intermeddling with the said fence or the possession of the lots.

The defendant in its answer denies that the premises claimed belong to the complainants, but on the contrary sets up and maintains that they have been dedicated to the public use as a landing or "square," for the use of the public, and that as such they are under the control of the city authorities, and admits that it has directed its officers to remove the fence in case the complainants do not do it after five days notice. The answer further alleges that the common council of the city, on the 5th day of November, 1870, declared the premises in question to be a public square by the name of "Mendota Public Square." It also alleges that the proprietors and owners of this property more than thirty years before the commencement of this suit, duly granted and dedicated the same to the public for their use as a public landing, street, or public way to and on to Lake Mendota, and that it had been used as such for that period by the public, without objection or hindrance from the complainants or others up to the time the complainants erected the fence around it in December, 1870.

It also states that in 1836 the proprietor of the land embraced within the city of Madison laid out and platted it into lots, streets and squares, and duly acknowledged and recorded such plat in the proper county, and that afterwards it was duly recorded in Dane county, in volume 2 of deeds, page 338, and that on that map or plat this property is designated as a "public landing," and defendant insists that it was thereby granted and dedicated to the public for such use.

The bill alleges that for more than twenty years last past the city has assessed and taxed it as private property, and that the complainants and those under whom they claim, have paid the taxes on such lots, and special assessments for sidewalks, which is admitted in the defendant's answer.

The only questions that require much examination are those relating to the validity and effect of the plats, and if they should be found invalid as grants, then as to whether the defendants have shown a dedication or title by prescription. This I say because I think the evidence abundant to show title in the complainants, unless it is avoided by the plats, dedication, or user.

Three plats of the city have been given in evidence. One made by James D. Doty, individually, acknowledged on the 27th day of October, 1836, and recorded in Iowa county on the 5th May, 1837. Upon this, property on Lake Mendota, now known and described as blocks 260, 261 and 262, and portions of the lots in question, are marked "Public Landing." The residue of these lots are a part of what is called on the plat the "Canal Reservation." It is claimed that this shows that the intention of the proprietor was to reserve certain portions of land on the margin of the lake on each side of the proposed canal for a "public landing." If this were all there was upon that question, I should concur with the defendant's counsel; but the case presents other and different questions. The land platted was *not* in Iowa county, where the plat was recorded, but was in the county of Milwaukee, so that it was not recorded in the county required by the statute. At the

same time another plat was made by J. D. Doty, "as agent, trustee and attorney of the Four Lake Company," which was acknowledged by him as such attorney on the 2d day of January, 1837, and recorded in Milwaukee county on the 17th day of January, 1837. Both of these plats appear to have been prepared by John V. Suydam, as surveyor, whose certificate on each bears date on the 27th October, 1836. On this map the property now known as blocks 260, 261 and 262, is not platted or subdivided into lots or blocks, nor designated as a "public landing." The property in question is left the same way, except that part included in the "canal reservation," which is the same as on the other plat. The surveyor's certificate on each is the same, and in neither is this property or any of this property on the lake not subdivided, mentioned as a "public landing" or "square," nor is it particularly described, nor are the dimensions, courses, or boundaries given. In these respects both plats are essentially defective and do not comply with the statute under which they were made; sec. 2, act of Michigan, of April 2, 1827, page 531 Michigan laws of 1833. And as they are not executed, acknowledged and recorded in accordance with the requirements of the statute, they are not valid or operative as grants of the portions designated as streets and public squares.

The complainants further object to their validity on the ground that neither Doty nor "the trustees of the Four Lake Company" *owned* the land at the time the plat was made and acknowledged. It cannot require the citation of authority to show that no person other than the owner or his authorized agent can plat and lay out a town so as to pass to the public the perpetual use of portions of the land for streets and public grounds; and as the evidence shows that neither Doty, individually, nor "the Trustees of the Four Lake Company," for whom he claimed to act as attorney in making one of the maps, owned this land when they were made, they are, on that ground, ineffectual to pass the title to these lots, or any portion of the land, as public grounds. When a town plat is made,

acknowledged and recorded in conformity with the statute, it operates, according to the express declaration of the act authorizing it, as "a sufficient conveyance of the streets and public grounds to the public use." But in order to devest the title of the proprietors, the formalities prescribed by the statute are essential.[1]

The counsel for the defendant claim that as Doty, in 1841, after making the plats, acquired the title to all this property, such subsequent purchase operated, under the doctrine of inurement, to affirm the plat and make good all grants and dedications therein contained. *Lee vs. Lake*, 14 Michigan, 12. But I do not think that doctrine applies to the case. That only applies to sales *with warranty*. In such cases, an after acquired title is held to inure to the benefit of a purchaser to prevent circuity of action. But I think an unequivocal recognition of the map after the subsequent purchase would operate as an affirmance, as will be more fully considered hereafter.[2]

Another map was made by M. M. Strong, as attorney for Kintzing Pritchette, on the 10th day of October, 1839, which on the same day was acknowledged and recorded in Dane county. On this map, all this property that is marked on the Doty map as a "Public Landing" (except the lots in controversy) was laid off into blocks as numbers 260, 261 and 262. This property in controversy is not laid off into blocks or designated at all, except by a blank space, but more than three-fourths of what was called in Doty's plat a "Public Landing," is laid off into blocks, and it was soon thereafter built upon, and has been occupied as private property ever since.

The defendant does not claim to make title to the property as a public square or landing under that plat, for it is not designated as such thereon. The mere omission to divide portions of the property within the limits of a town into lots or

[1] *Gardiner vs. Tisdale*, 2 Wisconsin, 153; *People vs. Beaubien*, 2 Douglass, (Mich.,) 256.

[2] *Cincinnati vs. White's Lessee*, 6 Peters, 431.

blocks, does not operate *ipso facto* as a grant or dedication of such parts. But it is unnecessary to continue the further consideration of these plats as legal instruments to pass the title, for the counsel of the defendant, on the hearing, did not contend with much confidence that they were executed in compliance with the requirements of the statute, so as to operate as conveyances. But he maintained that they, and particularly the Doty plat first mentioned, constituted very strong, if not conclusive evidence, of a dedication by the proprietor to the public for the use and purpose designated.

But it seems to me that one of the grounds upon which I have held the plats to be inoperative as grants, applies equally to this claim. I have held that as the person laying it out did not *own* it, he could not legally plat it, and it would seem to follow as a logical conclusion, that if he did not own it he could not dedicate it, for a party cannot *give away* what he does not own, any more than he can sell it.[1] In the decision of this case, the intention of Mr. Doty, as manifested by the plats, must be laid out of view, unless it shall be found that after he acquired the title in March, 1841, he, by some act, clearly recognized the plat. If he did, I think it would operate against him and those claiming under him as an estoppel *in pais;* and if he recognized it in such a way, I think it should be held also to be an affirmance of his original intention of dedication as shown by the map; it should be held to be equivalent to a re-execution and acknowledgment of it and give to it its full force and effect, so far as dedicating to the public the right to use the streets and public grounds.

The defendant, for the purpose of showing such recognition, gave in evidence several deeds executed by him, in which he refers to his individual plat as the plat according to which he sells. But I do not find that any deed of that kind was given *after he acquired the title.* They do not bind him, therefore, any more than the plat itself, so that the case must be deter-

[1] *Bushnell vs. Scott.* 21 Wisconsin, 451.

mined upon the question of dedication arising by prescription, user, and a peaceful and willing acquiesence by the owners in such use for such a length of time as to presume a grant. Upon this question there is some apparent conflict in the testimony; but I think when carefully examined, such conflict will be found to exist more in the different meaning of the terms used by the witnesses than in any difference in the facts they meant to relate. The defendant's witnesses state that they always understood it to be a "Public Landing," and that it had been so used up to the time of the building of the fence, since the town was first settled; while the witnesses on the other side say that it has been so used, but they never understood that the city or any one else *claimed* the right to use it in that way. The defendant's witnesses probably understood it to be such, because it was called the "landing," while the plaintiff's witnesses did no understand that it was so claimed simply because it was called such. There is no evidence of the exercise of any authority over it on the part of the public authorities. Governor Farwell, who owned it from February, 1847, up to 1859, and Richardson and Van Slyke, who have since acted as the agents of the complainants, testify that they never heard it claimed as public property until about the time it was enclosed by the fence. I think, therefore, that no formal claim of right had ever been made to it on the part of defendant, or any claim sufficient to require a denial of it by the owners, or any action on their part to prevent its being so used in order to protect their interest. It is clearly proven that it had been traveled over *ad libitum* by persons going to the lake, and that the fire companies of the city had used it on their parade days. This property had remained open and unimproved, although the complainants had granted permission to Manning, Briggs and Hudson to pile wood upon it, and to use it in that way for their private purposes for some portion of the time during the last ten or twelve years. The old pier or steamboat landing built in 1837, spoken of by some of the witnesses, was not opposite this property, but was, according to the testimony, op-

posite the old mill on block 262, and the pier built more recently is at the end of East Canal street, and not on any of this property. This is a narrow strip between East and West Canal streets; a part of it was, I should infer, reserved or intended to be by the original proprietors of the town, for a canal to connect Lake Mendota and Monona, to be used by them either as a raceway for mills, or for navigation, as the wants and necessities of the country should demand. Long before the place was much settled, I think the idea of using the lakes for purposes of navigation was abandoned, for in 1839 the space originally left as a landing, or for some other purpose, was platted for private uses, as appears by the Pritchette plat hereinbefore mentioned, and only the piece lying between East and West Canal streets, a part of which was designated as the canal reservation, was left, which may still have been considered as valuable for purposes of a water power.

This change of purpose seems to have been generally acquiesced in by both the public and public authorities, for there is no evidence of any objection ever having been made to it, and all of that part then platted has been occupied for a great many years with mills, factories, and dwelling-houses.

The fact that more than three-fourths of the land originally designated as a "Landing," has been devoted to private uses, and used as such a great many years, without objection on the part of the city or any one, negatives the idea that it was understood *originally* that this property was in fact dedicated or intended to be dedicated to public use. For if Doty dedicated any, he dedicated the whole marked on his map, and we have no right to limit or restrict his intention to dedicate only this piece in controversy. It must be borne in mind that at the time of that platting, the town in that vicinity was covered with timber and small bush, and that Gorham street in front of these lots, which is now one of the principal residence streets in the city, was not cut out, as Governor Farwell in his testimony, says, until 1849, when he says he had it cut out and cleared off. Before that he says the travel was not confined to

the streets in that part of the town, but wound around in places most available, without reference to the line of the streets, and as he first improved the property in that vicinity, I think his testimony as to its condition at that time and previously, entitled to the most weight of any given in this case. To hold that there had been any such use as the law contemplates as the foundation of a title by prescription, is attaching altogether too much consequence to the irregular travel and trifling use of it by the public before that time. I do not think such a use for any length of time of land in its natural state would devest the owner of his title to it, or any part of it. James Richardson testifies that in 1849 he was employed by Governor Farwell, who then owned this property, to survey and lay it out into lots and blocks, which he did, numbering the lots 1, 2, 3, and 4, block 272; that since that time it has always been claimed as private property, first by Farwell, and since by the Nelsons, and it has since been designated on the maps of the city generally in use, as "Block 272," and he swears that as the agent of the Nelsons, in 1860 and 1861, he permitted it to be occupied by Mr. Briggs, and after that by Manning and Hudson, for piling wood. No objection was made by the city to such use, nor was any claim made that it was public property. The case shows that ever since it was platted by Richardson for Farwell it has been assessed and taxed as private property, and that these claimants, Farwell and Nelsons, have paid the taxes assessed on it; that in 1866 the city passed an ordinance requiring the owners to build a sidewalk across it on Gorham street, which the owners or claimants built in pursuance thereof. These facts establish beyond controversy to my mind that the city in its corporate capacity has never claimed to occupy this property *adversely* to the owners up to about the time of the commencement of this suit, when they passed the ordinance declaring it a public square, as heretofore stated. Do these facts authorize the court to find that defendant had acquired a right to it by prescription as it claims? I do not think they are sufficient. Dedication may be presumed and

established by user for a period of twenty years. But I think such user, in order to constitute a prescription or dedication by prescription from acquiescence in such user, must have been *adverse* under some real or pretended claim or right, and it must have been exclusive. In the absence of proof to the contrary, I think the presumption is that the user was permissive and not adverse.

This was so laid down by the Supreme Court of this state, in *State vs. Joyce*, 19 Wisconsin, 91; but in the case of *Hanson vs. Taylor*, 23 Wisconsin, 547, a majority of the court overruled that case and held that the use in the absence of proof to the contrary must be *presumed* adverse. Chief Justice DIXON dissented, and filed an able and exhaustive opinion, in which he collates and reviews the leading authorities on the question, which I think triumphantly sustain his conclusions.

This case was relied upon by defendant as sustaining the doctrine that its right by prescription might be established by the mere user by the public, without any claim on the part of the city authorities, and without showing it to have been adverse in fact, claiming that it must be presumed to have been adverse. I cannot yield my assent to the rule laid down by the majority of the court in that case, and as it is in conflict with the decisions of the United States Supreme Court,[1] and as it relates to a common law question, and is not under the authority of *Yates vs. Milwaukee*, 10 Wallace, 497, binding upon the federal courts, I shall follow the decisions of the United States Supreme Court as controlling in this case.

In the case of *The City of Boston vs. Lecraw*, 17 Howard, 426, the court, in speaking of a right of way attempted to be established by dedication or prescription, say: "Till he reclaimed his land the public needed no grant or dedication by him, in order to their enjoyment of the right of navigation over it. The owner was not bound to exercise his right within

[1] *Irwin vs. Dixion*, 9 Howard, 10; *The City of Boston vs. Lecraw*, 17 Howard, 426.

a given time or forfeit it. A man cannot lose the title to his lands by leaving them in their *natural state* without improvement, or forfeit them by non-user. See *Batz vs. Ihrie*, 1 Rawle, 218." In this case as in that, the land has remained in its natural state, and if the use of it under such circumstances, in the manner detailed by the witnesses, constitutes a prescriptive right to it on behalf of the city, then the complainants will have lost the title to it "by leaving it in its natural state," and it will be "forfeited" by reason of the "*non-user*," which the court, in the opinion above cited, hold cannot be done.

The payment of taxes on vacant or unseated lands, the Supreme Court of New Hampshire have decided to be an act of ownership.[1]

In *Kirk vs. Smith*, 9 Wheaton, 288, Chief Justice MARSHALL, in commenting upon the operation of the statute of limitations, and the character of the possession of real estate, in order to make it available as the foundation of a right acquired under such statutes, says: "One of the rules which has been recognized in the courts of England, and in all others where the rules established in those courts have been adopted, is that possession to give title *must be adverse*. The word is not indeed to be found in the statutes, but the plainest dictates of common justice require that it should be implied. It would shock that sense of right which must be felt equally by legislators and by judges, if a possession which was permissive and entirely consistent with the title of another should silently bar that title. Several cases have been decided in this court in which the principle seems to have been considered as generally acknowledged, and in the state of Pennsylvania, particularly, it has been expressly recognized. To allow a different construction would be to make the statute of limitations a statute for the encouragement of fraud; a statute to enable one man to steal the title of another, by professing to hold

[1] *Little vs. Downing*, 37 New Hampshire, 355; *Farrar vs. Fessenden*, 39 do., 268; *Carr vs. Dodge*, 40 do., 403; *Hodgdon vs. Shannon*, 44 do., 573.

under it. No laws admit of such a construction." This expresses the rule in very clear and energetic language; but I think none too much so, when considered in reference to lands in their natural state.

In *Irwin vs. Dixion, supra*, the property had been taxed as in this case, and the owner had paid the taxes as in this case, and that fact is mentioned by the court as a circumstance repelling the idea of a dedication or prescription. The court further says, "In order to have a use or occupation accomplish this (prescription), it must have been adverse to the owner. (3 Kent's Commentaries, 444.) It must have also been an *exclusive* use by the public. It must also have been acquiesced in by the owner, and not contested or denied." This case does not come up to these requirements or to any one of them, but, on the contrary, the evidence clearly establishes that it has been claimed as private property by the owner since 1849, when it was laid out as private property that it has been taxed by the city as private property ever since that time, and that for a portion of the time it has been occupied by parties under the owners for private purposes.

These acts are inconsistent with the idea of a dedication, either express or by implication. They show, to my satisfaction, that the use of this property by the public was not adverse in its character within the meaning of the law, and was not acquiesced in by the owners in such a manner as to bring it within either the doctrine of dedication or prescription. I therefore find that the defendant has no right, title or claim to said property or the possession thereof, and that they have no right to remove the fence erected around the same by the complainants, and direct that a decree be entered according to the prayer of the bill, with costs to be taxed. The complainants' solicitor will prepare a decree according to this opinion, and present it to the judge to be settled according to the usual practice.

For a full citation of the authorities on the question of dedication, consult *United States vs. Illinois Central Railroad Co.*, Vol. 2 of this Series, 174, and notes. [*Reporter*.

BOGGS vs. WILLARD.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JUNE, 1872.

REMOVAL FROM STATE COURT.

1. NOT AFTER TRIAL.—Under the act of March 2, 1867, for the removal of causes from state to Federal courts, a party whose case has been tried in the state courts and appealed to the Supreme Court of the state, where the decree of the court below was reversed, with instructions to dismiss the suit, has no right to a transfer of the case.

2. An application comes too late after the issues have been tried in the state courts and a final hearing had.

3. NOT TO OBTAIN REHEARING.—It was not the intention of Congress that a party dissatisfied with an adjudication in the state courts should have the right to remove the cause into the Federal courts and there have a rehearing.

4. If the case is such an one as to give the party a right to a writ of error to the Supreme Court of the United States under the 25th section of the Judiciary Act, a review may be had in that manner, but in no other.

This was an application on the part of the complainant, George Boggs, for leave to file in this court a transcript of the record in this case, from the Superior Court of Cook county.

On the 6th of October, 1868, the complainant had filed his bill in the Superior Court of Cook county for relief against the sale under a power of sale contained in a certain mortgage given by himself to defendant Willard, setting up in substance that at the time the mortgage became due, complainant was in the state of Louisiana, and was there retained by reason of the state of war which then existed between the Southern Confederacy and the United States; that while the non-intercourse acts and the proclamations of the President in pursuance thereof were in force, the said Willard proceeded to sell the property in question upon the mortgage, and defendant Smith became the purchaser thereof; that afterwards Smith conveyed the property to Willard, and that the defendants,

Crane, Apthorp, Fitch, and Cotter, had since acquired some interest in the property by contracts or agreement with Willard, who still held the fee thereof.

Of the defendants, Crane and Fitch only were served with process. Willard appeared and answered, and an answer was also filed by Fitch, both of said answers denying the material allegations in the bill of complainant. The defendants, George Smith, Redmond Cotter, and William P. Apthorp, were brought into court by publication. Replications were duly filed, and on the 7th of September, 1869, the case was brought to final hearing and a decree rendered granting the relief prayed for by the bill. The defendants, Willard and Fitch, appealed to the Supreme Court of this state, where the errors assigned were heard and considered at the September term, 1870, and the Supreme Court reversed the decree of the Superior Court, and remanded the case to the Superior Court for further proceedings, in conformity with the opinion of the Supreme Court, which was that the bill should have been dismissed. The opinion of the Supreme Court will be found in 56 Illinois, 163.

On the filing of the mandate of the Supreme Court in the Superior Court at the June term, 1872, the complainant petitioned for a removal of the case from said court to this court, under the provisions of the act of March 2, 1867.[1] This application was refused and the cause dismissed in conformity with the mandate and opinion of the Supreme Court. It was conceded that the petition and affidavits asking for the removal were in due form, and that a proper bond had been tendered.

Edward S. Isham, for complainant.

Goudy & Chandler, for defendants.

[1] 14 U. S. Statutes at Large, 558.

BLODGETT, J.: Complainant now asks leave to docket the cause in this court, notwithstanding the action of the Superior Court in the premises, on the ground that he has fully complied with the law and is entitled to a transfer of the case into this court, and we concede that his application would be entitled to a favorable consideration were it not for the fact that the case seems to have been fully disposed of by the state court prior to the making of this application.

The act of March 2, 1867, is an amendment to an act for the removal of causes, in certain cases, in state courts, approved July 27, 1866,[1] which reads as follows: "If in any suit already commenced, or that may hereafter be commenced, in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, it be made to appear to the satisfaction of the court, a citizen of the state in which the suit is brought, is or shall be a defendant, and if the suit, so far as relates to the alien defendant, or to the defendant who is the citizen of a state other than that in which the suit is brought, is or has been instituted or prosecuted for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then, and in every such case, the alien defendant, or the defendant who is a citizen of a state other than that in which the suit is brought, may at any time *before the trial or final hearing of the cause*, file a petition for the removal of the cause as against him into the next circuit court of the United States, to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court on the first day of its session, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in said cause affecting or concerning him, and also for his there appear-

[1] 14 U. S. Statutes at Large, 306

ing and entering special bail in the cause, if special bail was originally requisite therein, and it shall be thereupon the duty of the state court to accept the surety, and proceed no further in the cause as against the defendant so applying for its removal."

It will thus be seen that the right to transfer a cause from the state to the federal court must be exercised before the trial or final hearing of the cause has transpired in the state court. An examination of the record in this case shows that the Superior Court had proceeded to hear the issues made by the bill, answers and replication, and had adjudicated thereon; that an appeal had been taken by part of the defendants to the Supreme Court of the state, where the decree of the Superior Court was reversed, and the cause remanded to be dismissed. This seems to me to be clearly a final hearing of the case. It was competent for the Supreme Court, under the practice of this state, to have dismissed the bill in the Supreme Court; but instead of doing so, they merely reversed the decree of the Superior Court, and ordered the case back to the Superior Court, to be there dismissed in conformity with their opinion. So that the Superior Court had no alternative, under the mandate of the Supreme Court, than to dismiss the bill in accordance therewith. The motion for a transfer of the case was not made until after the case had been finally heard in both tribunals, and it clearly seems to me that the application for a transfer came too late.

It was not the intention of Congress that a party dissatisfied with an adjudication in the state courts should have the right, after a decision against him, to remove the cause into the federal courts, and there have a re-hearing. If the case was such an one as to give the party a right to a writ of error to the Supreme Court of the United States, under the provisions of the 25th section of the judiciary act, a review may be had in that manner; but it seems clear to me that after a case has had a hearing before the state court and been finally disposed

of, the federal courts cannot take jurisdiction of it, except as is provided in the 25th section.

Other objections to this court taking jurisdiction of the matter were also urged by the defendants; but as this point seems to me conclusive, I have not thought proper to allude to them.

Application denied.

On the dismissal of the bill by the Superior Court, the complainant sued out a writ of error from the Supreme Court, and the cause was submitted at the September term, 1873, and is now pending.

For numerous authorities on this question of removal from state courts, consult also, *Akerly vs. Vilas*, Vol. 2 of this Series, 110; *Same case, post* p. 332; *Kingsbury vs. Kingsbury, ante*, p. 60. [*Reporter.*

In re SKELLEY.

District Court—Northern District of Illinois—March, 1871.

In Bankruptcy.

1. No Jurisdiction if Amount Reduced Below that Specified in the Act.—The District Court has no jurisdiction of an involuntary case in bankruptcy, unless it appears on the trial that the debtor, at that time, owes debts provable under the act exceeding the sum of three hundred dollars, and is indebted to the petitioning creditors in the amount of two hundred and fifty dollars. This is true even though the debtor, at the time of the filing of the petition, was indebted to exceed those sums. When his indebtedness, by subsequent payments, is reduced below those sums, the court loses jurisdiction.

2. Debtor may Disprove all Material Allegations.—The latter clause of the forty-first section of the act was intended to allow the debtor to disprove on the trial all the material allegations of the petition.

In re Skelley.

3. PAYMENTS—PROOF ALLOWED ON GENERAL DENIAL.—Payments made by the debtor to the petitioning creditors are material facts on the issue on denial of bankruptcy, and the debtor can introduce evidence of such payments without a special traverse of the amount of his indebtedness.

4. RECEIPT—WHEN WAIVER OF ACT OF BANKRUPTCY—The receipt of such payments by the petitioning creditors to an amount sufficient to reduce this indebtedness below the minimum established by the act, must be considered as a waiver of the alleged act of bankruptcy.

5. COSTS CANNOT BE ADDED, TO GIVE JURISDICTION—NOR COUNSEL FEES.—The petitioning creditors cannot add the costs paid and incurred by them to their debt in order to raise it above the jurisdictional limit. Such costs are not a part of their debt. The debtor must owe them two hundred and fifty dollars or they have no right to make costs. Nor can the creditors add counsel fees to their debt.

6. WHEN COSTS ALLOWED AGAINST DEBTOR.—In this case, the respondent, having been guilty at the time of the filing of the petition, was ordered to pay all costs up to the time of filing his denial, except the docket fee.

On the fifth day of July, 1870, John V. Farwell & Co. filed their petition in this court, alleging that they were creditors of said William H. Skelley in a sum exceeding two hundred and fifty dollars, to-wit: in the sum of nine hundred and eleven dollars and ninety-two cents; that said indebtedness was upon a promissory note for nine hundred and eleven dollars and ninety-two cents, given by said Skelley to the petitioners, bearing date on the third day of June, 1870, and payable to petitioners in fifteen days from date; that said Skelley owed debts to an amount exceeding three hundred dollars; that said Skelley, being a merchant and trader, was, on the fifth day of July, 1870, guilty of an act of bankruptcy within the meaning of the bankrupt act, by the suspension of payment upon his commercial paper, and failure to resume payment thereof within the period of fourteen days, the commercial paper upon which he so suspended payment being the said promissory note.

On the twenty-first day of September, Skelley filed a denial of the alleged act of bankruptcy, and the issue was by agreement of parties submitted to the court for trial without a jury.

On the trial the petitioner produced the note described in the petition, and showed that the sum was due and unpaid as set forth, at the time the petition was filed.

Proof was then introduced on the part of the respondent Skelley, showing that after the filing of said petition and before the filing of his denial, he had made payments on said note which reduced the amount due thereon at the time of the trial to less than two hundred and forty dollars.

The petitioners objected to said evidence as not being germain to the issue made by the pleadings, but the court admitted the proof, subject to objection.

It did not appear, from the evidence, that respondent owed any other debts.

It also appeared from the proof that the petitioners had advanced sixty-five dollars for costs in this proceeding, and had incurred liabilities for attorneys fees to the amount of two hundred dollars.

Tenney, McClellan & Tenney, for petitioners.

T. Leddy, for respondent.

BLODGETT, J.: The only question is, can the respondent be adjudged a bankrupt under this issue and proof?

It is clear that at the time of the trial respondent was not indebted to the petitioning creditors in the sum of two hundred and fifty dollars. And it does not appear that he then owed debts to the amount of three hundred dollars. But it is contended on the part of the petitioning creditors, that inasmuch as the proof shows that respondent owed them much more than two hundred and fifty dollars, and owed in the aggregate much more than three hundred dollars at the time the petition was filed, the evidence of the reduction of the indebtedness by subsequent payments, is wholly immaterial and inadmissible.

It is manifest that this court has no jurisdiction to adjudge a person bankrupt unless such person owes debts to the amount of three hundred dollars, and is also indebted to the petitioning creditor or creditors in the sum of two hundred and fifty dollars; the subject matter is not within the jurisdiction of the

court unless the indebtedness reaches the amount named. And I think the better rule is that, under the issue made by the denial of bankruptcy, the debtor can introduce proof to contradict all the material allegations in the petition.

In at least two important cases to which my attention has been called, *Brock vs. Hoppock*, 2 Bankrupt Register, 2, and *In re Moore*, 1 Bankrupt Register, 123, it has been held that the burden of proof rests upon the creditor, and he must establish his debt before proceeding to show acts of bankruptcy. But without intending to fully indorse the rule laid down in those cases—as I do not deem it necessary to go so far in this case—the last clause of the forty-first section of the bankrupt act provides that, "if upon the trial the debtor proves to the satisfaction of the court or jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens were the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover costs," thus evidently intending to allow the debtor the right on the trial to disprove all the material allegations in the petition, or in other words to rebut the *prima facie* case made by the petition and the preliminary proofs filed therewith.

It seems to me the question is analogous to the question of jurisdiction of the parties in a suit brought in the federal courts. If it appear at any time during the trial that the plaintiff is not entitled to sue in that court, his suit will be dismissed, although the right so to sue is not specially raised by the plea. So in proceedings in bankruptcy, if it appear at any stage in the trial that the case is not within the bankrupt law, the proceedings should be dismissed. It is true some of the courts have held that the debtor should specially traverse the amount of his indebtedness to the petitioner if he wishes to raise that question, but the reasons assigned for this holding do not occur to me as in harmony with the well received rules of pleading, or the spirit and letter of the bankrupt act. I

think, therefore, that the evidence as to the payments made by respondent to the petitioners after the filing of the petition, was admissible under the issue, and it appearing that by such payments the petitioners' debt is reduced below two hundred and fifty dollars, they have lost their standing in court to have the respondent adjudged a bankrupt.

The receipt of such payments seems to me a waiver by the petitioners of the act of bankruptcy alleged, so far as they are concerned, for if the respondent were to be adjudged guilty on their petition, the payments made to petitioners are certainly such payments as amount to preferences of themselves as creditors, and would prevent the petitioners from proving their debt.

I cannot presume that the creditors to whom these payments were made contemplated any such serious consequences to follow the mere receipt of part of their debt, but will rather presume, under the circumstances, that they intended to condone and waive the alleged act of bankruptcy.

The acceptance of these payments renders the petitioners incompetent to further urge or insist upon the act of bankruptcy. True, the petition is filed for the benefit of all creditors, but it is equally true that only creditors to whom the sum of two hundred and fifty dollars or upwards is due, can demand an adjudication, and that amount must be due at the time the court is asked to render judgment.

I ought, perhaps, before dismissing the subject, to notice the point made by petitioners in regard to the costs which have been paid and incurred by them, and which they claim constitute a part of their debt against the respondent.

This position seems to me wholly untenable. The debtor must owe his creditor two hundred and fifty dollars, and be guilty of an act of bankruptcy, before the creditor has any right to make costs for the purpose of having him adjudicated a bankrupt, and when the costs are made they are not added to the petitioners' debt, but the creditor may have them re-imbursed to him out of the debtor's estate if he is adjudged

a bankrupt, while he is only entitled on his debt to his *pro rata* with other creditors.

As to the counsel fees incurred by petitioners, the courts of this state do not recognize them as any part of the costs to be recovered in a case, and in bankruptcy it is a matter of discretion with the court to allow them a reasonable amount against the estate.

In this case the evidence shows the respondent guilty at the time the petition was filed, and as no stipulation seems to have been made, I shall render judgment that the respondent pay all taxable costs except docket fees made up to the filing of his denial, and that on such payment the proceedings be dismissed.

Where there are no other debts than that of the petitioning creditor, the debtor is entitled to have the proceedings dismissed, on tender of the debt and costs. In such case no counsel fees can be allowed, there having been no adjudication, and no estate or fund created. *In re Sheehan*, 8 Bankruptcy Register, 353. [*Reporter.*

AMORY vs. AMORY.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—APRIL TERM, 1872.

IN EQUITY.

DECREE — WHEN CONCLUSIVE.

1. The original judgment or decree of a court having jurisdiction, cannot be disturbed in a co-ordinate tribunal, nor in a collateral action.

2. The decree of a state court having jurisdiction of a suit and of the parties, is conclusive of the matters determined, and cannot be impeached in the courts of the United States.

3. The circuit courts of the United States are not constituted to review and reverse the proceedings and judgments of state courts. It is the duty of such courts to give full faith and credit to the judicial proceedings and records of state tribunals.

This was a demurrer to a bill in equity, by Angelina Amory, praying that the defendants, Samuel B. Amory and John Amory, as executors of the last will and testament of James Amory, deceased, might be perpetually enjoined and restrained from pleading, setting up, interposing, or insisting upon the record proceedings or judgment of the superior court of New York city, for divorce, in any action or proceeding complainant might commence or prosecute in the courts of Wisconsin, for the purpose of recovering any portion of the real or personal estate of which James Amory died seized or possessed; and that the complainant might be adjudged and decreed the lawful widow and heir of the said James Amory.

The bill sets forth that complainant intermarried with one William A. Williams, in the year 1839, at Portland, in Maine; that in September, 1841, at Boston, he shipped as second mate on board the ship Louvre, on a voyage from Boston to the East Indies and back, since which time she has not been able, after

great exertions, to get any intelligence of or from Williams, except that he had deserted the ship at Singapore, East Indies, and it was rumored that he was lost in the China Sea.

It is alleged that in the year 1845, complainant removed to New York, where she became acquainted with James Amory, to whom she was lawfully married on the 12th of March, 1846; that she continued to live with him as his lawful wife until September, 1856, being during all that time recognized, received and treated as his lawful wife by him and his family and friends; and that in that same time there were various suits and proceedings in court in which she was a party with James Amory, as his wife, and she as such signed deeds and releases, etc.

The bill further states that they separated by mutual consent; that in July, 1857, complainant commenced an action in the superior court of New York against James Amory, for a divorce, on the ground of adultery, in which, after a reference and report by the referee to the court, a decree was entered dismissing her bill, from which she, by her attorney, took an appeal in August, 1862, which was dismissed on motion of the attorney of James Amory, in May, 1863, on the ground that the appeal was not taken in time, according to the laws of the state. Complainant alleges that she was ignorant of the law which limited the appeal to thirty days after the service of notice of the judgment, and charges ignorance, negligence and bad faith on the part of the attorney who had appeared for her in the case.

The bill then states, that James Amory departed this life in the city of Fond du Lac, in the state of Wisconsin, on the 16th day of August, 1868, where he was a resident and inhabitant, seized of a large real and personal estate, without lawful issue, and intestate, leaving complainant his lawful widow and heir under the laws of Wisconsin.

It is further stated that on the 12th day of September, 1868, an instrument in writing, purporting to be the last will and testament of said James Amory, deceased, was presented to the county court of Fond du Lac county, by the defendants,

together with their petition, praying that a day be appointed for hearing the proofs of said last will and testament, and that notice be given, etc., and that letters testamentary be issued to them as executors; that the will was admitted to probate, and letters testamentary were issued to the defendants, from which complainant took an appeal to the circuit court of the county, on the hearing of which the defendants interposed the decree in the divorce suit as final and conclusive against her right to interfere in the proceedings before the county court; that such proceedings were had in the circuit court, and in the supreme court of this state, that the appeal from the order of the county court was dismissed, it having been determined in the supreme court, in the absence of any trial of any of the questions of fact involved in such appeal, that the judgment in said action for a divorce was final and conclusive against this complainant, in respect to her interest in the subject matter of said appeal. 26 Wisconsin, 152.

Complainant further charges that the said alleged will is not in fact the last will of James Amory; and that her defense to said will is in all respects good and true; and that but for interposing said judgment record of the action for divorce, she would have been able fully to prove and maintain the same.

The bill also prays that the judgments, orders and decrees of all said courts may be adjudged to be void and of no effect, and that the defendants, as executors, may be restrained and enjoined from executing said will under the order admitting it to probate, or from converting or disposing of the estate of said deceased; and that during the pendency of this suit the defendants be restrained and enjoined from executing the will, etc.

The records of the proceedings of all the courts mentioned in the bill are annexed.

In the record of the divorce case in New York, it appears that complainant was pressed to proceed with the suit, and that a decree was rendered on her default, dismissing the action.

On motion and affidavits the decree was opened, on condition that they would set down the case for trial peremptorily on a day named, and James Amory was ordered to pay two hundred dollars to enable her to prepare for trial. Reference was made to H. W. Robinson, by consent of the counsel of the parties. The referee took testimony and heard the parties by their counsel on the points submitted, and reported that the parties were not married on or about the 12th of March, 1846, or at any other time; that at that time, the complainant was the wife of William A. Williams, and not a single woman, nor capable of contracting a lawful marriage; and that Williams did not die previous to the 12th March, 1846.

On the 2d of October, 1860, the cause coming on to be heard on the report of the referee, this complainant's counsel moved the court to open the case for further proof, which was denied, and a final decree was rendered against her.

A petition was afterwards presented by this complainant to the superior court of New York, praying that the judgment against her be opened, which petition was denied.

J. M. Gillett and *Carpenter & Murphy*, for complainant.

S. U. Pinney, for defendants.

MILLER, J.: Complainant married James Amory as the widow of Williams. Amory had a right to consider her competent to enter into the marriage relation with him. They cohabited as husband and wife for nearly ten years, and during that time the facts of recognition occurred, he believing her to be his lawful wife. It coming to his knowledge that they were not lawfully married, for the reason stated, he was not estopped in the action for a divorce from pleading and proving that her husband, Williams, was not dead at the date of his own marriage with her the 12th of March, 1846. She imposed on him in marrying him before she had reasonable or legal cause of belief of Williams' death. She married him before legal presumption of death by the expiration of seven years from the

time Williams was last heard of. And it was proven before the referee that a letter from him had been recently received. She is in fault in this respect, not James Amory. Whenever he discovered complainant's want of legal right to become his wife, it became his duty to repudiate the marriage with her. The superior court was correct in disregarding the alleged facts of recognition in the petition to open the judgment.

This bill is virtually an appeal to this court from the judgment in the divorce case, and also from the orders and proceedings in the county and circuit courts of Fond du Lac, and of the supreme court of this state, and is sought to be sustained upon the alleged fraud of complainant's attorney, Shaffer. This court is not constituted to review and reverse proceedings and judgments of state courts. It is our duty to give full faith and credit to those judicial proceedings and records.

It is well understood that the courts of the United States will not revise or correct judgments or decrees of state courts, where the jurisdiction of those courts appears in the record. A judgment or decree pronounced by a competent tribunal against a party having notice of the pendency of the suit is to be regarded by every other co-ordinate tribunal, and if the judgment or decree be erroneous, the error can be corrected only by a superior appellate tribunal. The binding distinction is between judgments or decrees merely void, and such as are voidable only; the former are binding nowhere, the latter everywhere, until reversed by a superior authority.[1] The record in the action for divorce exhibits complete jurisdiction in the courts of the state of New York, and a conclusive judgment or decree not void anywhere. The complainant, by her bill and accompanying exhibits, attempts to show that the judgment or decree of that court is voidable for fraud on the part of her attorney. This she cannot do in this court. She must appeal for relief to the courts of the state of New York.

It is well settled by authority and long practice, that to an

[1] *Hollengsworth vs. Barbour*, 4 Peters, 466–470.

action on a judgment record, *nul tiel record* is the proper and only plea. The plea of *nil debet* is demurrable.[1] If it is found on inspection of the record, that the court had jurisdiction of the subject matter and of the parties, the judgment is conclusive. For fraud in obtaining jurisdiction, either by an unauthorized appearance of defendant by an attorney, or by confession of judgment by an attorney without authority, or by a false return to the original process, or by any fraud on the party, relief can only be obtained in the court possessed of the original record. The tribunal wherein an action is pending, on representation of the facts, usually gives the party time to make his application for relief to the original court; and upon a certificate that the judgment is reversed or vacated, the plea of *nul tiel record* becomes available. The original judgment or decree of a court having jurisdiction cannot be disturbed in a co-ordinate tribunal, or in a collateral action. It is conclusive on the merits.[2] Pleas to the contrary, of payment, or satisfaction, or release of the judgment, or of the statute of limitations, are allowable. Upon the same principle, the judgments and orders of the courts of this state are conclusive in a collateral action or proceeding.[3] The complainant, not having prosecuted her action for divorce with proper diligence, cannot come to this court for relief, on the ground that an appeal was pending from a discretionary order of the court denying her petition for a rehearing, at the time of the death of James Amory, particularly as that order was correct and justifiable.

The court of New York adjudged that complainant was not the wife of James Amory, consequently she cannot set up a claim here as his widow.

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[1] *Mills vs. Duryee*, 7 Cranch, 481.

[2] *Landes vs. Perkins*, 12 Missouri, 254; *Landes vs. Brant*, 10 Howard, 349–371; *Grignon vs. Astor*, 2 Howard, 319; *McPherson vs. Cunliff*, 11 S. & R. 422; *Dunlap vs. Stetson*, 4 Mason, 349; *Diggs vs. Wolcott*, 4 Cranch, 179; *Elliott vs. Peirsoll*, 1 Peters, 379; *McKim vs. Voorhies*, 7 Cranch, 28; *Mc. Elmoyle vs. Cohen*, 13 Peters, 312; *Burton vs. Burgot*, 10 S. &. R., 240.

[3] *Huff vs. Hutchinson*, 14 Howard, 586; *Parrish vs. Ferris*, 2 Black, 606.

The prayer of the bill, that the defendants as executors of the last will and testament of James Amory, deceased, may be restrained and enjoined from executing the will, under the orders of the county court admitting the same to probate, involves direct interference on the part of this court with an exclusive and independent power and duty of that court. That court possesses exclusive and independent probate powers. This court has none. The orders of that court within its jurisdiction are as conclusive as the judgments of this court. That court has charge of the estate of the testator, and has the lawful power to admit the will to probate, to issue letters testamentary, and to control the action of the executors according to the will, who are trustees of the legatees. All persons interested in the estate have lawful right to look to that court for protection That court has jurisdiction of the probate of the will and of issuing letters testamentary, and this complainant appeared and had her day in that court, the proceedings of which are sanctioned by the supreme court of the state. She cannot, as a non-resident of the state, claim the jurisdiction and action of this court, upon the facts pleaded in her bill with the exhibits annexed as part thereof, and the demurrer must be sustained and the bill dismissed.

The above case was heard before Judges DRUMMOND and MILLER, the former being of opinion that the complainant might, in this Court, show fraud in the proceedings in the courts of New York. No certificate of disagreement, however, had been signed at the time of the passage of the act of Congress of June 1st, 1872, 17 U. S. Statutes, 196, providing that in cases of a difference of opinion between the circuit and district judges the opinion of the former shall prevail, and thereupon, upon Judge DRUMMOND'S suggestion that the same point could be made by answer as well as by demurrer, the demurrer was overruled, with leave to answer, and the case is still pending.

The opinion and note in American Law Register for September, 1873, are not strictly correct, the case having been heard at the January Term, 1872, and decided at the April Term, and prior to the passage of the act of Congress.

The opinion of Judge DRUMMOND is reserved until the final hearing of the cause. [*Reporter*.

DRAKE vs. ROLLO, Assignee, etc., of the Merchants' Insurance Company.

Circuit Court—Northern District of Illinois—June, 1872.

SET-OFF.

1. A claim for loss under an insurance policy may be set-off by the insured against his indebtedness to the company.
2. Mutuality.—Such claims constitute mutual debts or credits within the meaning of the 20th section of the Bankrupt Act.
3. The rights of the parties are to be determined by the state of facts at the time of the loss.
4. Though such set-off gives the complainant a preference, it results from the business relations of the parties as they stood at the time of the loss.
5. Debt Not Due.—If his indebtedness is not due and the company is bankrupt, a bill in equity will lie to establish the set-off.

This was a bill to establish a set-off, filed by John B. Drake against William E. Rollo, assignee of the Merchants' Insurance Company.

On the 1st of June, 1869, the complainant borrowed of the insurance company the sum of $75,000, one-third of which was payable June 1st, 1872, and the remainder June 1st, 1874, to secure which he gave his notes and mortgage on certain real estate in Chicago. Subsequently he took several policies of insurance from the company, amounting to $17,000, upon which there was a total loss by the Chicago fire of October 9th, 1871. His claims under the policies were regularly proved up against the company on the 10th of November, 1871, and adjusted at their full amount.

The company having been rendered totally insolvent by this fire, on the 17th day of November, of the same year, a petition in bankruptcy was filed against it in the district court for this district, under which it was, on the 18th day of December, adjudged a bankrupt, and Mr. Rollo, the former secretary of

the company, was afterwards duly elected the assignee, and took possession of the estate.

The complainant did not prove his debt either before the register or with the assignee.

The complainant asked that his claims against the company for loss under his policies be set-off against his indebtedness to the company upon the note and mortgage.

Charles Hitchcock, for complainant.

A loss upon a policy of insurance, sustained before the filing of the petition in bankruptcy, may be set-off against a claim for money loaned. *Kostor vs. Easen*, 2 Moore & Scott, 112; *Grove vs. Dubois*, 1 Term R. 112; *Bize vs. Dickason*, Id. 285; *In the matter of the Globe Insurance Company*, 2 Edwards' Chancery R. 626; *Holbrook vs. Receivers, &c.*, 6 Paige, 220–231; *Osgood vs. De Groot*, 36 New York, 348; *Jones vs. Robinson*, 26 Barbour, 310; *Bradley vs. Angel*, 3 New York, 475.

The debt need not be due. *Ex parte Prescott*, 1 Atkyns, 230.

McCagg, Fuller & Culver, for defendant.

DRUMMOND, J.: The only question in the case is, whether the set-off can be allowed; and we are of the opinion that the plaintiff is entitled to the set-off he claims.

It depends upon the 20th section of the bankrupt law. That section is as follows:

"That, in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided*, that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition."

It is true in this case the plaintiff obtained part of the means which the company possessed with which to meet its liabilities in case of loss, and by permitting a set-off, it enables the

plaintiff to receive payment in full of his claim, while the general creditors of the bankrupt company are only partially paid, and thus he becomes a preferred creditor. But it is a preference growing out of the business relations of the parties as they stood at the time of the fire which rendered the company insolvent.

As soon as the loss happened there was the relation of debtor and creditor, and there were no special circumstances qualifying that relation. When the plaintiff complied with the conditions of the policy after the loss, and furnished his proofs, as soon as the specified time had elapsed it became a subsisting debt against the company, and, at the same time, the plaintiff was the debtor of the company for money payable in the future. It was then a case of mutual debt and credit, within the meaning of the 20th section above cited. The parties here trusted each other, and when the plaintiff was called on to meet his indebtedness, he would have the right to retain the amount of the loss and pay the balance. The amount thus retained in one sense he does not owe, because the law seizes it in his hands if he so wills, and by its own force extinguishes the debt. And the money loaned not being due at the time the bill was filed, and constituting a mutual credit, it is competent for the plaintiff, the company being insolvent, to call on a court of equity to allow the set-off.

Blodgett, J., concurring.

Consult the following case, *Hitchcock vs. Rollo, Assignee, etc.*, and *Sawyer vs. Hoag, Assignee, etc.*, post, p. 293, these cases being three from a large number of cases argued and submitted together, being most of the so-called "set-off cases" arising from the great Chicago fire, of Oct. 9, 1871.

The other questions involved, the liability on stock subscriptions, and the right of set-off as against money deposited with a complainant as Treasurer, are decided in *Scammon vs. Kimball, Assignee, etc.*, September, 1873, to appear in a subsequent Volume of this Series. [*Reporter.*

HITCHCOCK vs. ROLLO, ASSIGNEE, ETC., OF THE MERCHANT'S INSURANCE COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JUNE, 1872.

SET-OFF.

1. ASSIGNEE—MUTUALITY.—The assignee of a claim against an insolvent insurance company for loss under its policies, assigned after notice of insolvency, cannot set it off against his previous indebtedness to the company. The debts and credits are not mutual under the 20th section of the Bankrupt Act.

2. Such a set-off would be unjust and inequitable.

3. RULE IN EQUITY.—Though courts of equity follow the law in allowing or refusing set-off, special circumstances may control the equity.

4. An assignee of a claim seeking to establish a set-off should show, not merely that he is the nominal owner of the claim, but that he has good equitable grounds for relief.

5. PURCHASED CLAIMS.—*It seems*, that a debtor to an insurance company might set-off a claim purchased before the filing of the petition, in good faith and for value, if without notice of the insolvency of the company.

6. TWENTIETH SECTION BANKRUPT ACT CONSTRUED.—A court of equity should construe the 20th section of the Bankrupt Act in furtherance of the main purpose of the law, and not permit one creditor to inequitably obtain payment in full, to the sacrifice of the claims of the other creditors.

7. The language of that section does not foreclose a court of equity from disallowing a set-off when it would work injustice.

This was a bill by Charles Hitchcock against William E. Rollo, assignee of the Merchants' Insurance Co., to establish a set-off.

This case, in many respects, resembles the case of *Drake vs. Rollo, Assignee, etc.*, immediately preceding.

The complainant, on the 15th of May, 1867, borrowed of the insurance company the sum of $20,000, payable in five years, to secure which he gave his notes, secured by mortgage on real estate in Chicago.

The insurance company was rendered insolvent by the Chicago fire of October 9th, 1871, at which time complainant held three policies of insurance against the company, amounting to $11,000, upon which there was a total loss, which was regularly proved up against the company and adjusted.

The company had also issued a policy for $1,500 to the firm of Hitchcock, Dupee & Everts, of which complainant was a member, covering property owned by them, upon which there was also a total loss. The company was also indebted to the firm upon open account in the sum of $877. These firm losses were regularly proved up and adjusted, and the company issued to the firm their certificate of indebtedness for the amount, which certificate was, on the 27th of October, assigned and transferred to the complainant, but there was nothing to show that value was actually paid for the assignment. It was admitted that the complainant, at the time of the assignment of the claims to him, knew that the company was insolvent, and that proceedings in insolvency or bankruptcy were imminent.

On the 17th day of November, 1871, a petition in bankruptcy was filed against the company in the District Court of this district, upon which it was afterwards adjudged a bankrupt, and Mr. Rollo elected the assignee.

This bill sought to set-off all of the above claims against the complainants' indebtedness to the company.

Charles Hitchcock, pro se.

A debtor for money borrowed may purchase the negotiable notes of an insolvent at any time before the filing of a petition in bankruptcy against him, and set them off under the 20th section of the act of 1867, notwithstanding he had notice of insolvency, and purchased for the purpose of making the set-off.

First—The purchase of such paper is a "giving of credit," which is mutual within the meaning of the bankrupt law.

2 Smith's Leading Cases, 316, 317; *Hankey vs. Smith*, 3 Term Reports, 507; *Collins vs. Jones*, 10 Barnewall & Creswell, 328.

The rule has never been questioned. In the following cases, cited by Mr. Hoyne in argument, viz., *Belcher vs. Lloyd*, 10 Bingham, 310; *Lackington vs. Combes*, 6 Bingham, (N.C.) 71; *Fair vs. McIver*, 16 East, 130; it appeared that the parties claiming the set-off had no *real* interest in the notes, and the decisions proceed upon that ground.

Second—Such negotiable notes may be set-off under the bankrupt law.

The only argument against the right is that "if allowed it violates the spirit and policy of the bankrupt law, defeats the equal distribution of the assets of the bankrupt, which it is the evident purpose of the act to accomplish, and, in effect, operates as a fraud on it."

Congress has deliberately determined that the occasional failure of the chief purpose of the act in this way is on the whole a less evil than uncertainty as to the time within which credit may be given and set-off received.

The earliest bankrupt law of England did not provide for the set-off of mutual debts or credits. This omission, as Lord MANSFIELD says, "shocked the sense of justice of mankind," and in 1732, by the 5 George 2. C. 30, § 28, the right of set-off was secured, "if the credits were given or the debts incurred at any time before the person became bankrupt." The act of bankruptcy was the limit after which credit could not be given. The act seems to have been considered subject to three objections: *First*—That a person might give the credit to a notorious insolvent at any time before an act of bankruptcy, and yet secure the set-off. *Second*—A person giving credit without notice of an act of bankruptcy might be deprived of his equitable right of set-off. *Third*—No limitation was fixed beyond which the giving of credit should not be called in question.

No suggestion was ever made in the courts that it was pos-

sible to meet these objections by construction based on the spirit and policy of the bankrupt law.

In 1806, by the act of 46 George, 3 C. 135, § 3, the supposed objections were removed and the right of set-off was secured, notwithstanding a prior act of bankruptcy "provided the credit was given to the bankrupt two months before suing out the commission, or provided the person claiming the right of set-off had not, at the time of giving such credit, notice of a prior act of bankruptcy, *or that he was insolvent or had stopped payment.*" Here for the first time a set-off was, in terms, denied, where the claimant had notice at the time of giving it that the party was insolvent, or had stopped payment. The American bankrupt acts of 1800 and 1841 contained no similar provision. See §§ 10, 13 and 42 of act of 1800 and 2, 3 and 5 of act of 1841.

This act was in force and administered according to its terms for twenty years, when in 1825, by act of the 6 George, 4, only such persons were excluded from the benefit of set-off as had, when they gave the credit, notice of an act of bankruptcy. *Hawkins vs. Whitten*, 10 Barnewall & Cresswell, 221.

The same provision is to be found in all the acts of Victoria. Under these acts the English rule, so far as allowing a set-off when credit was given, even with notice of insolvency, was made to conform not only to the former English but also to the American law.

The uncertainties attending the judicial inquiry into "notice of insolvency" was found to be an evil, and therefore the provision was repealed. In a case arising out of the fire of October 9th, 1871, by which all insurance companies were rendered insolvent, there is no difficulty in fixing notice of insolvency; but rules of law are general, and in the great majority of cases the greatest uncertainty and consequent injustice would attend the inquiry.

Congress had these acts before it when the bankrupt law was framed. It is a matter of public history that the author of the

act, Mr. Jenckes, of Rhode Island, had carefully studied the English legislation upon the subject.

The act of 46 George, 3, contained language appropriate to accomplish the purpose of excluding the right of set-off in such a case as that before the court and under discussion.

The courts of England had held that the repeal of the language secured the right, notwithstanding known insolvency at the time the credit was given, and yet Congress passed the law of 1867, omitting all provision on the subject.

It was evidently the intention to fix a certain time, viz., the filing of the petition, after which credit should not be given with a view to set-off, and prior to which no inquiry should be made as to notice of insolvency.

The statutes of Massachusetts have a similar history. The early acts provided for a set-off of all claims "existing at the time of the first publication of the notice of the issuing of the warrant." In 1855, in the case of *Aldrich vs. Campbell*, 4 Gray, 284, it was decided that claims "purchased for a valuable but not a full consideration against a debtor in embarrassed circumstances, who afterwards obtained a certificate of discharge in insolvency," could be set-off.

In the following year, 1856, the supposed evil was met by a law providing "that no set-off should be allowed of a claim purchased with reasonable cause to believe the debtor insolvent." These acts and decisions were before Congress when the bankrupt act was passed. It is wholly improbable that Congress, with attention addressed to the subject, as appeared by the 20th section, should not have used either the language of the Massachusetts act of 1856 or the act of George 4, if the provisions of those acts had been approved. It would seem that, Congress having deliberately and intentionally failed to deny a set-off where the party had notice of insolvency, it should not now be urged that the courts should interpolate the language in the act, and that what was denied by Congress should be accomplished by interpretation.

McCagg, Fuller & Culver, for defendant.

The main argument of the complainant in support of his right to set-off claims for losses adjusted and purchased since the bankruptcy of the company, against loans obtained from it, is founded upon the proviso to the first clause of the twentieth section of the bankrupt act as construed in *In re City Bank, &c.*, 6 Bankrupt Register, 71.

This clause ought not to be construed as giving authority to allow *all* claims purchased before the filing of the petition, but only as a prohibition against allowing any to be set-off which are purchased after that date, leaving those purchased before to be allowed or not as shall appear just and equitable according to the previously settled bankrupt law.

The allowance of mutual credits is designed to protect parties who have dealt with each other, and to preserve their equities by requiring only the balance to be paid as shall appear to be due upon the account stated between them. It is not to be construed to allow a party, after adjusting his own claims and having been allowed his own equities, to purchase the claims of other parties and tack them on his own to increase his allowance, to the prejudice of the other creditors.

The theory of set-off, both in equity and by the bankrupt law, is that the balance found due upon a statement of the accounts between the bankrupt estate and its debtors or creditors, shall be paid to the other by the debtor party, because that would be the result of the dealings between the parties if their transactions were consummated; but it would frustrate all the theory and equities of the law to allow one debtor of the bankrupt estate, after satisfying his own equities, to buy the claims of a party who was simply a debtor of the bankrupt estate from the beginning, and have them allowed in full to satisfy the balance found due after satisfying his own equities.

The complainant did not deal with the bankrupt upon a real or supposed understanding that the claims thus purchased should be set-off, and to allow them to be set-off in full would

be to give him a preference over the creditors of the bankrupt estate.

Such preference would be the creation of a right by operation of law, not in favor of either party to the assigned claim, but in favor of one who has had all his own equities allowed and adjusted, and who has purchased no equity from any one else, and would result in an inequitable extinction of his own debt, to the prejudice of the other creditors of the estate.

For this reason and because the bankrupt law was framed upon the theory of preserving the equities of the bankrupt and those dealing with him in respect of their transactions, the claims purchased after the known insolvency of the bankrupt ought not to be allowed to be used to disturb and destroy the rights of the creditors of the estate.

The complainant may take such a dividend on the assigned claims as the assignor was entitled to, but no more, for he only bought a legal claim to which no equity was attached, and having had his own equities allowed so far as his own dealings with the bankrupt are concerned, he ought to be satisfied, and the court ought not by construction to extend the law of set-off in his favor, and clearly the express provisions of the bankrupt act do not require it.

The authorities founded upon former British and American statutes, and the general equitable rules of set-off, do not allow this to be done. *Smith vs. Hill*, 8 Gray, 572; *Smith vs. Brinckerhoff*, 8 Barbour, 519; 2 Story's Equity, Secs. 1435, 6, 7; 2 Smith's Leading Cases, 366, 373, 4, 8; *Smith vs. Brinkerhoff*, 6 New York, 305; Lee's Law and Practice in Bankruptcy, 283; *Clarke vs. Hawkins*, 5 Rhode Island, 219; Waterman on Set-off, 190, 1, 2, 3; *Dickson vs. Evans*, 6 Tennessee, 53; *Ogden vs. Cowley*, 2 Johnson, 274; *In the matter of the Receiver of the Middle District Bank*, 1 Paige, 584; *Steinforth vs. Fellows*, 1 Marshall, 184; *Ex parte Hale*, 3 Vesey, 304.

Thomas Hoyne, for defendant.

Complainant claims to set-off a claim for loss under a policy of insurance which he purchased after knowledge of insolvency of the company, caused by the great fire of 1871. The dealings between the parties consisted of a *single* transaction, that of complainant in obtaining a loan—there were no *mutual dealings; mutual debts* or *credits;* no accounts; neither is the claim of complainant reciprocal, as it did not arise out of the same transaction.

It is insisted that under the 20th section of the bankrupt law this is a *mutual debt*, or a *mutual credit* between the parties to this suit, which upon an *account between them* being stated, one debt shall or may be set off against the other, and the balance only shall be allowed or paid.

In *Globe Insurance Company*, 2 Edwards' Chancery, 625, as respects this doctrine of the mutual right to set off claims, the Chancellor holds that they must be *such as arise out of the mutual dealings of the parties in the course of their business.* When parties have had dealings so as to produce mutual debts and credits or reciprocal demands, growing out of the *same transaction*, it is the balance only which exists as a debt.

The doctrine of set-off presupposes that there has been *mutual dealings or reciprocal demands* between the parties, and the section of the bankrupt act speaks only of *mutual debts and mutual credits between the parties*, and expressly provides for the statement of *the account between them*, and after one debt is set off against the other it is only *the balance* of the account which is to be allowed."

Thus the section provides for the set-off of a claim only in cases where the parties have had some mutual dealings, and when *some account* of such dealings exists. Out of such dealings the claim is to arise, and then when such account is stated, and one claim is set off against the other, *the balance* only becomes a mutual debt or credit.

Thus the section is in full accord with the nature of all set-

offs, to which the whole doctrine of set-off is applicable. And besides this, this construction is in full accord with the policy of the bankrupt law, which recognizes only *bona fide dealings;* not contrived to work injustice or fraud, or to secure by any *intrigue* the preference of one creditor over another.

The same construction is placed upon the English statute, although the language of the act is different from ours. *Hawkins vs. Whitten*, 10 Barnewall & Cresswell, 217; 21 English Common Law Report, 101; *Fair vs. McIver*, 16 East, 130; *Lackington, Assignee of Richardson vs. Combes*, 6 Bingham, 71; 37 Common Law Report, 515.

In any case, if it appears that the claim to be set off is the result of a *mere contrivance* or color to make it *appear* that defendant was a *bona fide holder* of the claim, it is treated by the English courts as a fraud upon the act. *Lackington, Assignee of Richardson vs. Combes*, 6 Bingham, 71; *Smith vs. Hill*, 8 Gray, 572; *Howe vs. Stowe*, 3 Allen, 113; *Smith vs. Brinckerhoff*, 8 Barbour, 519; *Ogden vs. Cowley*, 2 Johnson, 274; *Dickson vs. Evans*, 6 Term Reports, 57.

In *Ogden vs. Cowley*, 2 Johnson, 274, Chief Justice KENT remarks: "It would be unjust if one person who happened to be indebted to another at the time of his bankruptcy were permitted by any intrigue between himself and another so to change his own situation as to diminish or totally destroy the debt due to the bankrupt by an act *ex post facto*."

Any act which tends to defeat the purpose and policy of the law, and which is done in contravention of and with intent to defeat such policy and purpose is a fraud upon the bankrupt act. Bump, notes, 455; *Samson vs. Burton*, 4 Bankruptcy Register, 1; *In re Gregg*, Id., 150; see Waterman on Set-Off, section 182, citing 8 Barbour, 519.

It would be difficult to conceive of a case where the injustice would be greater or the intention more manifest to defeat the purpose of the act, and where there was so little pretence of *mutuality* of dealing as in this case. The policy of insurance was *purchased after it became known* the company was insol-

vent—where there had been no dealing, no account kept, and where the claim was purchased after insolvency, with a view to pay a debt due a bankrupt, thus allowing the debtors to purchase in claims at 25 per cent. or less, paying their own claims at par, and exhausting the estate of the general creditors.

The next claim to set-off arises out of the relations of the stockholder to the company. Can the stockholder who is indebted upon his stock for *non-payment* of his share or shares set off a debt due him from the company, before his own debt to the company be first paid in full?

1. There are some axioms of equity law which make this claim of the stockholder utterly inadmissible. The *creditor* must be *first paid*. In all associations of partnership, joint stock, or corporate organization, the capital is held to be pledged for the payment of the general creditor. The capital is a *trust fund*. If this fund has been distributed, so that it is in the hands of the stockholders, or in the hands of others than *bona fide* creditors, or purchasers, leaving debts *unpaid*, such holders take the property charged with the trust in favor of the creditors.

2. The capital stock of a corporation is a *trust fund*, for payment of debts of the corporation. Creditors have a lien, or right of priority upon it in preference to any of the stockholders, and no stockholder can entitle himself to any dividend or share of the capital stock until such debts are paid. 2 Story's Equity Jurisprudence, § 1252; *Curren vs. State of Arkansas*, 15 Howard, 307; *Mumma vs. Potomac Company*, 8 Peters, 281; *Nathan vs. Whitlock*, 3 Edward's Chancery, 215; *Nathan vs. Whitlock*, 9 Paige, 152; *Lawrence vs. Nelson*, 21 New York, 158.

In *Hillier vs. Alleghany Mutual Insurance Company*, 3 Pennsylvania State Report, 470, it is expressly held that where the funds were not adequate to pay all losses occasioned by a fire which had occurred, the entire funds belong to the losers. The stockholder who is liable for unpaid installments cannot set off his loss, but must first pay in his capital, and then he shares

pro rata with other losers. *Long vs. Penn Insurance Company*, 6 Pennsylvania State Reports, 421; *Osgood vs. Ogden*, 43 New York, 70; *Lawrence vs. Nelson*, 21 New York, 158; *Vose vs. Grant*, 15 Massachusetts, 505; *King vs. Fowler*, 16 Massachusetts, 397; *Wood vs. Dummer*, 3 Mason, 308.

John Borden, also for the set-off, cited, in addition to cases cited by other counsel, the case of *Young vs. the Bank of Bengal*, 1 Deacon, 622, where the doctrine of mutual credits is elaborately discussed by Lord BROUGHAM, and numerous authorities commented on.

DRUMMOND, J.: The only point not decided in the previous case is as to the claim assigned to the plaintiff. It is admitted that the plaintiff, at the time of the assignment, knew that the company was insolvent, and that proceedings in insolvency or bankruptcy were imminent.

There are two questions which we may consider in this case, as they have both been argued, and exist either together or separately in several of the cases which were taken up at the same time. 1st. Can the claims assigned be allowed as a set-off; and, 2d. Does the knowledge which a person had of the pecuniary condition of the company, and the probable consequences growing out of the same, affect the right of set-off?

As to the first question: If the debt of the plaintiff were due, and no assignment had been made, in a suit brought against the plaintiff, he could not set-off the claim due on the policy to him and his two partners, because that would make the partners liable for the individual debt of each member of the firm. *Dehon vs. Stetson*, 9 Metcalf, 341; Waterman on Set-off, sec. 222, and the authorities there cited. If the case were reversed, and suit were brought by the plaintiff and his partners on the policy against the company, the latter could not set-off the debt due from the plaintiff. In each instance there is wanting that mutuality which the statute requires, and the debts exist in different rights. If the joint claim had

become vested in the plaintiff, so that he could have brought suit in his own name, it might be different. *Columbian Insurance Company vs. Black*, 18 Johnson, 149; *Parker vs. Beasley*, 2 Maule & Selwyn, 423.

The case of *Tucker vs. Oxley*, 5 Cranch, 34, was cited and relied on at the argument. A firm had been dissolved and the partnership assets had passed to one of the firm, who had become bankrupt. The assignee brought suit against two persons on a debt due the bankrupt. They were allowed by a majority of the court to set-off a debt previously due to them from the firm. This was the ruling under the peculiar wording of the bankrupt law of 1800, and seems to be an exceptional case.

It is very doubtful whether that would be proper, under the present bankrupt law, which contains provisions as to the distribution of the joint and separate estate of partners, not in the law of 1800.

An assignee of a firm brought an action on a debt due the firm. It was held, by the Supreme Court of Massachusetts, that the defendant could not set-off a debt from one of the partners.[1]

Courts of equity follow the law in allowing or refusing set-offs, qualified by the rule that special circumstances may control the equity.[2]

What are the special equities of the plaintiff? He alleges that the debt owed by him is not yet due; that the company is insolvent and in bankruptcy, and that the firm claims against the company were assigned to him with knowledge of the insolvency. If we concede that an assignment by the other partners might give the plaintiff the right to a set-off, we think it is incumbent on him, when he comes into a court of equity and seeks to have the assigned claims allowed as a set-off, to show that he is more than the nominal owner. In

[1] *Williams vs. Brimhall*, 13 Gray, 462.

[2] 2 Story's Equity Jurisprudence, 1437.

other words, his equitable grounds for relief should be clearly established. From all that appears in this case, the fair inference is that these claims were merely transferred to enable the holders of the fifteen hundred dollar policy to realize their claim in full out of an insolvent corporation. No special equities within the true meaning of the rule are shown.

As to the second and more important question—the words "mutual debts," and "mutual credits," used in the 20th section of the present bankrupt law are not essentially different from those to be found in most of the previous bankrupt laws of England and of this country, subject to various conditions and limitations. And the argument is that the court cannot go outside of the language of the section, and that if it is a mutual debt, or a mutual credit, it can in all cases be set-off, except when it is a claim in its nature not provable against the estate, or one purchased by or transferred to the bankrupt's debtor after the petition in bankruptcy is filed, those only being excluded by the terms of the law. And in support of this position, the case of *Hawkins vs. Whitten*, 10 Barnewall & Creswell, 217, decided under the English bankrupt law of 6 George the IVth, was relied on. The question there was, whether the defendant had the right to set-off notes of the bankrupts obtained by him after he knew that the bankrupts, who were bankers, had stopped payment, but before he knew that an act of bankruptcy had been committed? And the court decided that he had such right, although he might have reason to believe them to be insolvent.

But the case was decided under a statute which had omitted the words of a previous statute, which declared that the set-off should not be allowed where the party had obtained the claims against the bankrupt after he stopped payment. The omission of such words where the law had been substantially re-enacted, with that exception, was an argument well nigh irresistible in favor of the construction given by the court, notwithstanding Lord TENTERDEN significantly asked whether it would not be a fraud on the bankrupt law.

It is said that in view of such a decision as this and of the English bankrupt laws, the twentieth section of our bankrupt law in making only two exceptions to the right of set-off in the case of mutual debits or credits — one a claim not provable against the estate, and the other a claim obtained after the filing of the petition — intended to allow all others. That principle goes very far, and we are not prepared to admit it to that extent. We believe many cases may be imagined where a court of equity would not permit a set-off, although not within the exceptions. For example: a person might have borrowed the whole capital of the insurance company, and be on the way to its treasurer to pay it, and meet a creditor who informed him he had a petition in his hands ready to be filed in the district court, and alleging the undoubted fact of the bankruptcy and insolvency of the company. In such case, if he had taken the money to buy up claims against the company at ten cents on the dollar, would equity allow the set-off because the petition was not then actually filed?

The case supposed is within neither of the exceptions of the twentieth section, and yet we cannot doubt that it would be the duty of a court of equity to disallow a claim of set-off which would thus permit a debtor to absorb the whole capital of the company by credits so purchased, for the reason that it would be unjust, and a substantial fraud on the bankrupt law.

The object of all general rules applicable to the rights of persons should be to promote the greatest good. It is upon that principle that the bankrupt law rests — the equal division among all creditors of the property of an insolvent company or individual.

We are called on to make the application of principles — not in a solitary case here and there, but under circumstances calculated to bring to a crucial test the soundness of rules — the insolvency and bankruptcy of numberless insurance companies whelmed in a common ruin, and where, if the doctrine contended for by the plaintiff is maintained, a comparatively few persons holding all their assets, amounting to millions, can

retain them by going into the market and purchasing, with full knowledge of all the facts, claims against them for a nominal sum.

But one decision under the bankrupt law of 1867 was cited on the argument having a bearing on the point now under consideration, *In re The City Bank of Savings*, 4 Legal News, 81, by the district judge of California. It was held in that case that the fact that the creditor of the bankrupt, at the time he assigned his claim to a debtor, had reason to believe the bankrupt to be insolvent, did not prevent the debtor from setting off against the debt the claim thus assigned. The report of the case does not state explicitly whether the debtor, at the time of the assignment, knew of the insolvency of the bankrupt, but perhaps it may be an inference that such was the fact.

The court overruled the objection that the effect of allowing the set-off would be a fraud on the law, and seemed inclined to give an absolutely literal construction to the twentieth section, while admitting that the result would be to enable one creditor to obtain full satisfaction of his claim to the prejudice of other creditors.

We admit that this may be so, if there is good faith. We do not doubt that a debtor can purchase a claim against the creditor, at any time before the filing of the petition in bankruptcy, and set it off, provided the purchase is made without notice of insolvency, for value, fairly, and not in fraud of the law; and we thus give full effect to the statute.

If the case decided in California intended to sanction a set-off such as is claimed here, we do not feel inclined to adopt the rule there stated. We hold it to be the duty of a court of equity so to construe the twentieth section as not to suffer it to defeat the main purpose of the bankrupt law, or to permit one creditor in this way to obtain the payment of his claim in full, to the sacrifice of the claims of other creditors.

It is said that there must be some time fixed within which doubtful transactions can no longer be questioned. It is for a

court of equity, or the bankrupt court in the exercise of its equitable powers, to decide, looking at all the circumstances of the case, under what limitations the right shall be placed.

Our attention has been directed to a case not cited on the argument, *Smith vs. Hill*, 8 Gray's R., 572.

In that case the defendant purchased claims against a person, knowing him to be insolvent, and having reason to believe that he was about to be put into insolvency; and then, in a suit by the assignee, proposed to set off these claims against a debt he owed the insolvent. Under the statute mutual debts and demands could be set off; but the court held that the effect of allowing the set-off would be to interfere with the proper distribution of the estate of the insolvent, and would be contrary to the spirit of the insolvent laws; that it would enable a debtor to give a preference to such of the creditors as he might favor, and would allow debtors to pay their debts by purchasing claims against the insolvent at a discount.

And that decision was not made under amendments which had expressly prohibited such set-off, but independently of them, and on the general ground that it would be inequitable to permit the set-off. We think the principles of that case are applicable to this, and that they constitute a true test to determine whether the set-off claimed here should be allowed. See Hilliard on Bankruptcy, 224, who adopts the principle of *Smith vs. Hill;* Avery & Hobbs on Bankruptcy, 157; Waterman on Set-off, 141.

We are of the opinion, therefore, on both of the grounds stated, that a set-off is not allowable.

In construing our bankrupt law we have to regard it as a whole system — framed, doubtless, at that time in view of previous laws, both English and American; but where it was impossible to include all the various circumstances and contingencies which had given occasion to the numerous alterations and modifications of previous laws, and this is especially true of the twentieth section in relation to set-off.

Notwithstanding the language there is general, and only two

exceptions are named, we must still think that it did not intend, outside of these exceptions, to foreclose a court of equity from disallowing a set-off when it would on the whole work injustice.

We think, therefore, we are at liberty to place such a construction on our bankrupt law as is in harmony with the common sense of equity; and that such a set-off as the one claimed here ought not to be permitted, is abundantly manifest from the whole tenor of recent legislation, both English and American. We confess we think we go quite far enough, which we do in obedience to authority, when we admit that a man may borrow a part, or even the whole, of the capital of an insurance company, and then take out policies of insurance, it may be because of the loan, and in case of loss and insolvency of the company, set off the loan against the loss on the policy, even though it may leave other creditors with nothing. There may be instances where this can be done, when it would be difficult to reconcile it with our notions of a sound morality, or with that rule which requires us to do to others as we would have them do to us.

But we do not feel inclined to go further, and adopt a rule which would permit the debtors of a bankrupt company thus to realize, for a nominal sum, the full amount of their claims on the company, while other creditors thereby go empty-handed.

As to the assigned claims the set-off will not be allowed.

BLODGETT, J., concurring.

Consult *Drake vs. Rollo, Assignee, etc.*, ante, p. 273; *Sawyer vs. Hoag, Assignee, etc.*, following case; and for a full discussion of the right of set-off as against liability on stock subscription, and money received as Treasurer, see *Scammon vs. Kimball, Assignee, etc.*, September, 1873, to appear in a subsequent Volume of this Series.

For the general question of liability on stock subscriptions, after bankruptcy of the company, consult *Upton, Assignee, etc. vs. Hansbrough*, post, p. 417; *Same vs. Burnham*, post, p. 520, and cases there cited.

For opinion of Supreme Court in the set-off cases, affirming decree of the court below, consult 6 Chicago Legal News, 183. [*Reporter.*

SAWYER vs. HOAG, Assignee, etc., of the Lumbermen's Insurance Company.

Circuit Court—Northern District of Illinois—June, 1872.

BILL TO ESTABLISH A SET-OFF.

On the first of April, 1865, the complainant, Charles B. Sawyer, subscribed for fifty shares of stock of the Lumbermen's Insurance Company of Chicago. At the time of his subscription he was informed by the directors that he must pay or give his check for the full par value of his stock, and that the company would loan to him eighty-five per cent. of such par value on his note for five years at seven per cent. interest, secured to the satisfaction of the directors by good collateral securities. He thereupon gave to said company his check for $5,000, the full amount of the par value of said stock, and received from the company a check for $4,250, and gave to the company his note for the amount of said check, payable in five years, with interest at seven per cent. per annum, and secured the same by assignment of fifty shares of stock of the Fifth National Bank of Chicago, $100 each, which securities were then, and continued to be, ample security for the payment of said note and interest. On the first day of March, 1870, Sawyer took up said note and gave in substitution thereof his note for $4,250, payable on demand, with interest at ten per cent. per annum, depositing the same security.

On the third day of December, 1867, said company issued to Justin Hayes a policy of insurance against loss by fire to the amount of $5,000. The property mentioned in said policy was destroyed in the October fire, 1871, and on the 25th of January, 1872, said loss was adjusted by the company at $5,000, and a certificate of such adjustment, and the amount

due and payable thereunder, was executed and delivered by the company to Hayes. On the same day, Hayes sold and assigned said certificate to the complainant for 33 per cent. of its *par* value. After the October fire, in 1871, and at the time complainant purchased said certificate of Hayes, it was a notorious fact, and well understood by the public and complainant, that said company was hopelessly insolvent. On the 20th of June, 1872, a petition in bankruptcy was duly filed against said company, which, on the 13th of September, 1872, was adjudicated a bankrupt, and the defendant, Hoag, afterwards elected assignee. Thereupon the complainant offered to set off his claim under said certificate against his indebtedness upon his note to the company. The assignee refused to allow it, and was at the time of filing of the bill, proceeding to collect said note, and to realize upon said securities without deduction of the claim of the complainant.

The original transaction was regarded and treated by the company and complainant as a loan by the former to the latter, and his stock was at all times treated and regarded as fully paid. Both transactions were entered upon the books of the company as cash transactions. At various times after the giving of the original note, the company reported to the authorities of Illinois, and other states, that its capital stock had been fully paid in.

The complainant, in his bill, prayed to have his claim under the certificate of loss set off against his note held by the assignee, and to have the collateral securities in the hands of the assignee returned to him.

Daniel L. Shorey, for complainant.

It is the right of a debtor of an insolvent insurance company to purchase adjusted and negotiable claims at a discount and set them off against his indebtedness, notwithstanding the purchaser knew the company was insolvent at the time he purchased them.

Under the 20th section of the bankrupt act of 1867, in cases

of mutual debts or credits between the parties, an account is to be stated, and the balance is to be allowed or paid. Two conditions only are required by the statute: 1st. That the claim to be set off shall be in its nature provable against the estate. 2d. That such claim shall have been purchased by or transferred to the debtor before the filing of the petition.

The complainant is within both conditions. The claim is a provable claim, and it was purchased and transferred to the debtor nearly five months before the filing of the petition in bankruptcy. A certificate of loss is assignable under the statute of Illinois. (Gross' Statutes, p. 461.) The assignee may bring an action in his own name on such an instrument. *Stewart vs. Smith*, 28 Illinois, 397.

The assignee, if sued by the person or company issuing such certificate, would have the right to set-off the same in such suit. Gross' Statutes, p. 512.

Under the bankrupt act his right of set-off is at least as well defined. He holds a claim, independent of the right of set-off, that is, in its nature, provable against the estate. Under that act, a claim to be set-off may be either a *debt* or a *credit*.

"A debt which may be proved before the commissioners and to the owner of which a dividend must be paid, is a debt in the sense of the term as used in the statute." *Tucker vs. Oxley*, 5 Cranch, 34.

"A credit is such as in its nature must terminate in a debt." *Rose vs. Hart*, 8 Taunton, 492.

It will not be disputed that on the purchase of the certificate the complainant had a right of action against the company thereon. If the company had sued the complainant on his promissory note, he could have pleaded his claim under such certificate as a defense in set-off.

If the complainant had sued the company on his certificate, it could have maintained no other defense than a set-off under the note against him.

If each party had recovered a judgment against the other on their respective claims, either would have the right upon a

summary application to the court rendering such judgments, to have the one set-off against the other. *Barber vs. Spencer*, 11 Paige, 518.

The relative rights of the parties are in no wise changed by the bankruptcy proceedings, and the assignee in bankruptcy has no greater or other right than the bankrupt would have had if there had been no such proceedings. *Mitford vs. Mitford*, 9 Vesey, 100; 2 Smith's Leading Cases, 370.

Under section 14 of the bankrupt act, rights of action of the bankrupt vest in the assignee, who may prosecute the same in the same manner, and with like effect as they might have been prosecuted by the bankrupt. The Massachusetts insolvent law of 1838 contained a similar provision, which is construed in *Bemis vs. Smith*, 10 Metcalf, 194.

If it is claimed that the assignee of the bankrupt has some other and higher right than the bankrupt would have, it is incumbent on those who make the claim to show upon what statute, upon what authority, or upon what legal principle the distinction in favor of the assignee is supported.

The earlier bankrupt acts in England contained no provision in relation to set-off. This was regarded as a defect, and it was to remedy this inconvenience that the act of the 5 George II was passed. *Ex parte Prescott*, 1 Atkyns, 230.

The several bankrupt acts in England and the United States from the time of George II have fixed a time prior to which any claims acquired by the debtor to the bankrupt might be set-off. In all the English bankruptcy acts there is an element of uncertainty. In the earlier, the right of set-off could not be acquired after notice of an act of bankruptcy, insolvency, or stopping payment. In the latter acts, notice of insolvency and of stopping payment was omitted. In the act of 1867 the limit is fixed at the filing of the petition.

The English authorities, from the time of George II to the present, do not contain a single case where a provable claim has been disallowed in set-off if it had been purchased prior

to the time fixed by the bankruptcy act in force for acquiring such claims.

For cases where set-off has been allowed, see *Dickson vs. Evans*, 6 Durnford & East, 57; *Ogden vs. Cowley*, 2 Johnson, 273; *Hankey vs. Smith*, 3 Durnford & East, 507; 2 Smith's Leading Cases, 316.

In *Hawkins vs. Whitten*, 10 Barnewall & Cresswell, 217, a case under the act of 6 George IV, chapter 16, section 50, which gives the right of set-off in all cases where it existed before any act of bankruptcy had been committed, or where there was no notice of such act, the defendants, two days after they had knowledge that the bankrupts had stopped payment and shut up their banking house, industriously procured notes of the bankrupts for the purpose of set-off. The court held that notice of insolvency, or notice of stoppage of payment, are no longer ingredients upon the point of set-off. Notice of an act of bankruptcy is alone the criterion or dividing point, and although these notes were purchased for the very purpose of making them the subject of a set-off, still this has not been prohibited, and cannot be said to be illegal.

The English authorities reaching back under the several bankruptcy acts nearly one hundred and fifty years, probably do not contain one case in conflict with the decision in the case last cited. The latest cases in the High Court of Chancery maintain this doctrine to its fullest extent. *In re Universal Banking Corporation, Ex parte Strang*, 5 Law Reports, Chancery Appeals, 492; see also, *In re The City Bank of Savings*, District Court of California, 4 Chicago Legal News, 81.

There is nothing in the act of 1867 narrowing the right of set-off as it previously existed. It has fixed the limit of time for purchasing claims in set-off at the filing of the petition in bankruptcy, and thus avoided the uncertainty of the English statutes upon which this act was modeled.

In New York the rule is well settled that claims may be purchased by a debtor to the bankrupt for the purpose of set-off, at any time prior to notice of proceedings in bankruptcy.

Ogden vs. Cowley. 2 Johnson, 274; *Smith vs. Brinckerhoff*, 6 New York, 305.

There are a few cases holding that under the banking law a set-off cannot be procured after the bank has stopped payment. *Diven vs. Phelps*, 34 Barbour, 224. Also cases holding that members of insolvent mutual insurance companies cannot set-off losses due to them against claims of the company, on the ground that such members hold the double relation of debtor and creditor, and have voluntarily entered into engagements that modify the general rule of set-off.

It is not worth while to consider whether these cases are well decided, for they expressly limit the effect of the decision to cases of mutual companies, and at the same time incidentally affirm the general rule relied on in this argument. *Lawrence vs. Nelson*, 21 New York, 158.

Under the insolvency law of Massachusetts of 1838, the right of set-off accrues at the time of the first publication. *Demmon vs. Boylston Bank*, 5 Cushing, 194; *Aldrich vs. Campbell*, 4 Gray, 284. The ruling in this last case was not modified by the case of *Smith vs. Hill*, 8 Gray, 572, as contended by counsel for defendant. On the contrary, the court decided the case in *Smith vs. Hill* wholly upon the facts peculiar to the latter case, and the decision left the case of *Aldrich vs. Campbell* undisturbed.

There is no possible parallel between the facts in *Smith vs. Hill* and the facts of the case now before this court. There is nothing to distinguish this case from the cases of *Aldrich vs. Campbell* and *Hawkins vs. Whitten*, before cited. In all three of the cases alike, the claim was purchased against a party in failing circumstances, for a good but less than a full consideration, for the purpose of a set off.

In *Smith vs. Hill*, on the part of the debtor, there were promises not fulfilled, there was a trust sought to be violated, and acts designed to mislead. In this case there is not an intimation that any of such facts exist.

The fact that the complainant, at the time of the purchase

of his claim in set-off, was a stockholder of the company, imposes upon him no peculiar disability in relation to the purchase of such claims. The relative rights of the company and of himself are the same as the rights between the company and a stranger. The corporation is a legal entity, having a separate existence as a person distinct in law from all its members. It is so created for the express purpose of having a distinct and independent existence and capacity in legal contemplation, so that it may contract or be contracted with, sue or be sued by any of its members. *Massachusetts Iron Company vs. Cooper*, 7 Cushing, 187; *Smith vs. Hurd*, 12 Metcalf, 384; *Hill vs. Manchester, etc., Waterworks*, 5 Barnewall & Alderson, 875; Angell & Ames on Corporations, 413; *The Pondville Company vs. Clarke*, 25 Connecticut, 97.

The conceded facts show that the original transaction was regarded and treated by the company and the complainant as a loan from the company to him, and his stock was at all times treated and regarded as fully paid. It was not permissible for the company to treat this transaction otherwise than a loan. The complainant could not treat it otherwise. The assignee cannot now treat it otherwise, for he has no greater rights as against the complainant than the company had.

But admitting, for the purposes of the argument, that complainant's indebtedness is for his original stock, there is nothing in principle to distinguish such indebtedness from any other, and it does not follow as a conclusion of law that he could not offset it by the claim in controversy. The rule of set-off, as established in the bankrupt act, makes no distinction as to the nature of the debts against which a set-off may be allowed.

This precise question has been fully considered by the English High Court in Chancery. *In re Universal Banking Corporation, Ex parte Strang*, 5 Law Reports, Chancery Appeals, 491; *In re Duckworth*, 2 Chancery Appeals, 577. See also, *The Pondville Company vs. Clarke*, 25 Connecticut, 97.

VOCKE, ASSIGNEE OF THE GERMANIA MUTUAL INSURANCE COMPANY, VS. YAEGER.

In this case, founded on essentially the same state of facts and tried at the same time, *Rosenthal & Pence*, for assignee, cited the following authorities: *Curran vs. State of Arkansas*, 15 Howard, 304; *Wood vs. Dummer*, 3 Mason, 308; *Hightower vs. Thornton*, 8 Georgia, 493; *Nathan vs. Whitlock*, 3 Edwards, 215; same case, 9 Paige, 152; *Vose vs. Grant*, 15 Massachusetts, 505; *Richards vs. Insurance Company*, 43 New Hampshire, 263; *Briggs vs. Penniman*, 8 Cowen, 387; *Slee vs. Bloom*, 19 Johnson, 456; *Dudley vs. Price*, 10 Ben. Monroe, 84; *Ward vs. Griswoldville Manufacturing Company*, 16 Connecticut, 593; *Henry vs. Vermillion Railroad Company*, 17 Ohio, 187; *Barry vs. Merchants Ex. Company*, 1 Sanford's Chancery R., 280; *Lawrence vs. Nelson*, 21 New York, 158; *Hillier vs. Alleghany Mutual Insurance Company*, 3 Pennsylvania State R., 473.

These cases were heard and taken under advisement at the same time with *Hitchcock vs. Rollo*, and *Drake vs. Rollo*, and the bills dismissed by Judges DRUMMOND and BLODGETT, on the grounds stated in the opinions in these cases. The cases are now pending in the United States Supreme Court.

[*Reporter.*

Since the above was in plates, the Supreme Court has affirmed the decree of the court below in above cases, opinion filed Dec. 23, 1873, reported in 6 Chicago Legal News, 133. [*Reporter.*

In re ESS AND CLARENDON.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JULY, 1872.

IN BANKRUPTCY.

RESUMPTION OF PAYMENT.

1. Any creditor may avail himself of an act of bankruptcy committed by his debtor in the non-payment of any of his commercial paper, and a resumption of payment after the expiration of fourteen days does not cure the act unless the debtor's whole indebtedness is paid.

2. Although the suspended paper, the non-payment of which constituted the act of bankruptcy, be taken up and paid before the filing of the petition, any creditor may still insist upon having the debtor adjudged a bankrupt, and his estate administered upon under the act.

3. SECRET PARTNER—WHEN LIABLE TO ADJUDICATION.—A secret partner, known to the petitioning creditors to be such at the time the indebtedness was incurred, and a guarantor on the commercial paper, the non-payment of which constituted the alleged acts of bankruptcy, may, although entirely solvent, and having personally committed no acts of bankruptcy, be adjudged a bankrupt, on petition filed against both partners.

On the 7th of March, 1872, the firm of T. B. Weber & Co., of the city of Chicago, filed their petition in bankruptcy, alleging that Jacob Ess and William Clarendon, doing business as co-partners in the city of Peoria in this state and district, under the firm name of Jacob Ess, were indebted to the petitioners in the sum of $2,724.28, for goods sold said firm in due course of their business as merchants and traders at Peoria; that said Jacob Ess and William Clarendon, as such partners, within the six calendar months next preceding the filing of said petition, being merchants, had stopped and suspended payment of their commercial paper, and did not resume payment thereof for fourteen days, to-wit: that they suspended payment upon a promissory note for the sum of $500, dated

April 12, 1871, payable to the order of Mabie, Murray & Morgan, two months after its date, and also of another note of the same date, payable to the same parties five months after date, and another note of the same date and amount, payable to the order of the same parties in three months after the date thereof.

Ess appeared and confessed the acts of bankruptcy alleged, and consented to an adjudication of bankruptcy. Clarendon appeared and answered, denying that he was or had been at any time within the six months preceding the date of the filing of the petition, a partner of the said Jacob Ess, under the style of Jacob Ess, or under any other name. He also denied that he had been engaged in business within the period aforesaid in said district in any manner whatever, or that he was indebted to the said petitioners in any sum whatsoever, either individually or as a member of the firm of Jacob Ess, or that he had committed any act of bankruptcy, as alleged in said petition.

It appeared that Clarendon individually was entirely solvent, and no acts of bankruptcy were charged against him other than as above stated in reference to the three notes to Mabie, Murray & Morgan.

The facts further appear in the opinion.

Rich & Noble, for creditors.

L. S. Hodges, for bankrupts.

BLODGETT, J.: The trial was had upon the issue made by the denial of Clarendon, on which it appeared in evidence that some time in the year 1866 Clarendon, who was then a resident of New York city, and engaged in the wholesale boot and shoe business in said city, wrote to Jacob Ess, who was at that time living in Memphis, proposing to unite with Ess in business; Clarendon to furnish the goods, and Ess to manage the business of a retail store in some place which they might select in the West. After some correspondence it was agreed that

Ess should start the store at Peoria, and that Clarendon should furnish him with the goods for stocking the store. In a letter of December 27, 1866, from Clarendon to Ess, Clarendon uses this language: "Now I have to say to you, that if you act to me like a brother, I will do as well for you as I have done for my brothers. The way I have always done with them was, that I bought the goods and they sold them, and they took half the profits and I took the other half. If this meets your ideas we will put the thing through." In a letter of January 23d, 1867, Clarendon writes: "Don't be afraid of any of them in the shoe business, for I know I can skin them on buying. I will make the profits right. You need not let on that your partner is in the shoe business until you see how it will work. I think you had better make the name of the concern Jacob Ess & Co., and if you will only sell the goods I am certain I can buy them, and if you are going all right I may come out to see you next summer." Again, in the same letter, he says: "If you could send the money when you order the goods, it will give my folks here a better opinion of the business. I am not going to let them know that I am in with you; but I guarantee that you will pay for them, and I will see that the goods are charged to you at small profits." Under date of February 9th, 1867, Clarendon writes to Ess: "In writing let me know every day's sales. I will do the very best I can to put the goods at low figures. I have put most of these at cost." This was after Ess had opened the store at Peoria. On March 2d, Clarendon writes to Ess: "Write to me twice a week, and at the end of the month send me a statement of what you have sold during the month, and what you have done with the money. Keep your books straight." In a subsequent letter Clarendon writes to Ess: "If you have not got your sign yet, have it Jacob Ess. I will send the goods in your name from here."

A large number of other letters were introduced and read upon the trial, but the quotations I have made already show clearly enough to my mind that a partnership was entered into

between Ess and Clarendon, and that, by Clarendon's especial request and direction, the business was to be done in the individual name of Jacob Ess. Ess testifies that, sometime in 1869, Clarendon told him that he thought they had now got on far enough so that he (Ess) could pay him (Clarendon) fifty dollars per month for the profits of the concern. Ess demurred to this, stating that they had not yet reached the point where Clarendon's share of the profits would amount to that, but agreed to send Clarendon all the money he could spare from the business; and, accordingly, during the year 1869 and part of the years 1870 and 1871 Ess remitted to Clarendon various sums of money, amounting in all to between $700 and $800, to apply upon the profits of the business, During this time, Clarendon changed his business relations in New York, the firm of which he had been a member having dissolved, and, sometime in 1870, Clarendon commenced purchasing goods on account of Jacob Ess from the firm of Mabie, Murray & Morgan, in New York, Clarendon guaranteeing the payment of the bills. It also appears, however, that Ess purchased of other dealers in the same line of goods, and it does not appear that Clarendon in all cases guaranteed the payments, although Ess testifies that he notified his creditors and those with whom he dealt, as a rule, that Mr. Clarendon was his secret partner. Ess also testifies that the notes described in the petition were given in due course of business to the firm of Mabie, Murray & Morgan, and that at the time mentioned in the petition, to-wit, as those notes respectively fell due, the said firm suspended payment thereof, and that on or about the first of March last, all of said notes remained unpaid. There was no evidence of a dissolution of the firm or of any change in the relations of the partners. It was proved by the petitioners that Ess, at the time of purchasing the goods of them, told them that Clarendon was a partner in the business.

The only evidence interposed on the part of the defense is that of the respondent William Clarendon, who testifies that, about the first of March last, he paid the notes to Mabie,

Murray & Morgan, described in the petition, and took them up, he being liable thereon as guarantor.

The evidence on file in the case, and on which the rule to show cause was granted, shows that Jacob Ess was indebted to the petitioning creditors for goods sold them in the due course of their business to the amount named in the petition, to-wit: $2,724.28.

It is contended on the part of the respondent, Clarendon, that inasmuch as he had paid the commercial paper described in the petition prior to the filing of said petition, that this proceeding cannot now be maintained.

Assuming, as I do, that the proof shows that Clarendon was a partner with Ess in business at Peoria, the question is, have the petitioners, Weber & Co., the right to avail themselves of the act of bankruptcy, which was committed by said firm by suspending payment of its commercial paper, to-wit: the Mabie, Murray & Morgan notes, and to have the firm and its members declared bankrupts, notwithstanding said paper had been paid and taken up prior to the filing of the petition in this case?

There can be no doubt that the suspension upon this paper for fourteen days was an act of bankruptcy, and as much against Clarendon as against Ess, if Clarendon was a member of the firm. And if it were an act of bankruptcy, is that condoned or so far defeated as to prevent any other creditor from availing himself thereof by the mere payment of the suspended paper?

If a merchant or trader suspends payment of his commercial paper for fourteen days, that is an act of bankruptcy of which any creditor may avail himself. The act of suspension raises a presumption of insolvency and makes the party guilty thereof a proper subject for proceedings in bankruptcy.

It is not enough that the debtor shall pay his suspended paper alone. He must pay or settle all his debts and satisfy all his creditors, if he would wipe out the offense against his commercial standing, committed by the suspension. Other-

wise a trader might, although hopelessly insolvent, avoid adjudication as a bankrupt by the payment of a tithe of his indebtedness, because, as a rule, but a small proportion of a trader's indebtedness is evidenced by commercial paper. I conclude, then, that William Clarendon and Jacob Ess were, at the time of the filing of this petition, partners in business under the firm name of Jacob Ess, at Peoria, in this district; that they were guilty of the acts of bankruptcy charged in the petition; and that the petitioning creditors had the right to avail themselves of that act of bankruptcy, although the suspended paper had been taken up by one of the partners at the time of the filing of the petition.

The finding of the court, therefore, is that William Clarendon was guilty with the said Jacob Ess of the act of bankruptcy charged in the petition, and that he and the said Jacob Ess must be adjudicated bankrupts.

The general question of the liability of secret partners was not raised in this case, the respondent Clarendon not denying on the trial that he had guaranteed the payment of the indebtedness to Mabie, Murray & Morgan, the non-payment of which was the act of bankruptcy charged, nor that the petitioning creditors had been informed by Ess, at the time of contracting the indebtedness to them, of his (Clarendon's) relations to the business.

For a discussion of the liabilities of secret partners, consult *Waugh vs. Carver*, 1 Smith's Leading Cases, and numerous authorities there cited; Story on Partnership, §§ 63, 373; Parsons on Partnership, 61–67, and notes; *Winship vs. Bank of the United States*, 5 Peters, 529; *Bank of Alexander vs. Mandeville*, 1 Cranch C. C. R. 575; *Ex parte Warren*, Davels, 320; *Bigelow vs. Elliott*, 1 Clifford, 28. [*Reporter.*

TURNER vs. NEWMAN.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JULY TERM, 1872.

The proceedings to restore records in the United States Courts must conform to the act of Congress, and not to the State statute.

Petition to restore the record of a judgment heretofore rendered in this court in favor of the petitioner against the defendant, praying a summons, and that the case proceed in the manner provided by the statute of the state of Illinois, approved April 9, 1872, 2 Gross, 317, commonly called the Burnt Records Act.

Paddock & Ide, for plaintiff.

D. S. Pride, for defendant.

BLODGETT, J.: The plaintiff claims that by the 5th section of the act of Congress, approved June 1, 1872, entitled "An act to further the administration of justice," he is entitled to proceed in conformity with the state statute. That section provides "That the practice, pleadings, forms and modes of proceeding in other than equity and admiralty causes, in the Circuit and District Courts of the United States, shall conform as near as may be, to the practice, pleadings, forms and modes of proceeding existing at the time in like causes in the courts of record of the state in which such courts are held, any rule of court to the contrary notwithstanding: *Provided*, That nothing herein contained shall alter the rules of evidence under the laws of the United States as practiced in the courts thereof."

We do not think the restoration of the records of this court is by the act just quoted brought within the provisions of the state law on that subject. By act of Congress, approved March

3, 1871, [1] provision is made for the restoration of the records of the Federal courts in all cases when the same shall be lost or destroyed. And by the act of Congress, approved March 18, 1872,[2] the method of proceeding under that statute is further regulated and defined.

It seems clear to us that it was not the intention of Congress, by the 5th section of the act of June 1st, to repeal or abrogate the act of March 3, 1871, and its amendment. The proceeding to restore records does not come within the general term of practice or pleadings in the courts, which obviously has reference to the mode of commencing and trying causes, but it is a special proceeding *sui generis*, and to be governed by the statute authorizing it. The act of March 3d applies to all cases in law, equity, and admiralty, while the conformity act of June 1st only applies to proceedings at law, so that if the construction contended for in this case was to prevail, we should have one mode of procedure in cases at law governed by the state statute, and another, in equity and admiralty cases, governed by act of Congress.

For these reasons we consider that proceedings to restore records in this court must conform to the act of Congress, and that the state statute does not control, although we admit that the state statute is in many respects much more simple and easy of application than the act of Congress.

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[1] 16 U. S. Statutes at Large, 474.
[2] 17 U. S. Statutes at Large, 41.

KENOSHA AND ROCKFORD RAILROAD COMPANY vs. SPERRY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JULY TERM, 1872.

FORECLOSURE BY SCIRE FACIAS.

1. Under the statute of Illinois, *scire facias* does not lie to foreclose a mortgage not duly acknowledged.

2. The statute only applies to mortgages "duly executed and recorded."

3. Defects in acknowledgment cannot be cured, and where the requirements of the statute in these respects have not been fulfilled, it cannot be cured by testimony *aliunde;* nor does the statute making instruments not acknowledged or proved according to law, notice to subsequent purchasers or creditors[1] cure the defect.

Demurrer to *scire facias* by the Kenosha & Rockford Rail Road Company to foreclose a mortgage. The facts appear in the opinion.

Sleeper & Whiton, for plaintiff cited; 2 Gross' Statutes, p. 91, § 42; *Moore vs. Titman*, 33 Illinois, 358; *Rond vs. Kemp*, 16 do., 446; *Hamilton vs. Doolittle*, 37 do., 480; *Deininger vs. McConnel*, 41 do., 227.

Winston, Campbell & Willard and *M. C. Johnson*, for defendant, cited; Session Laws of Illinois of 1846–7, p. 37; Gross' Statutes (3d edition), p. 86, § 17; *White vs. Walkins*, 23 Illinois, 482; *Woodberry vs. Manlove*, 14 do., 216; *Marshall vs. Maury*, 1 Scammon, 232; *McFadden vs. Fortier*, 20 Illinois, 515; *Osgood vs. Stevens*, 25 do., 90; *Carpenter vs. Movers*, 26 do., 162; *Mason vs. Brock*, 12 do., 273; *Booth vs.*

[1] Revised Statutes of Illinois, chap. 24, sec. 28; Gross, 1872, p. 88.

Cook, 20 do., 129; *Holbrook vs. Nichol*, 36 do., 163; *Chateau vs. Jones*, 11 do., 321.

BLODGETT, J.: The main ground of demurrer is that the *scire facias* does not show that the mortgage was duly acknowledged. No seal was affixed to the certificate of acknowledgment which purports to have been taken before a notary public. The statute of this state, sec. 23 of chapter 57 of the Revised Statutes of 1845, in force at the time this mortgage was executed, provides that "if default be made in the payment of any sum of money secured by mortgage on lands and tenements, duly executed and recorded, and if the payment be by installments, and the last shall have become due, it shall be lawful for the mortgagee, his executors, or administrators, to sue out a writ of *scire facias* from the clerk's office of the Circuit Court," etc.

It is objected that this mortgage is not *duly executed and recorded.* By the 16th section of chapter 24 of the Revised Statutes of 1845, it is provided that "deeds and instruments of writing for the conveyance of real estate, in this state, or any interest therein, whereby the rights of any person may be affected in law or equity, before they shall be entitled to record, shall be subscribed by the party or parties thereto, in proper person, and acknowledged or proved before one of the following officers, to-wit: When acknowledged or proved within this state, before any judge, justice, or clerk of any court of record in this state, having a seal; any mayor of a city, notary public, or commissioner, authorized to take the acknowledgment of deeds, having a seal, or any justice of the peace." Section 18 provides that "deeds and other conveyances of real estate, executed and acknowledged or proven in proper form in this state, before any judge or justice of the Supreme or Circuit Courts, or before any court or officer having a seal, and attested by such seal, shall be entitled to record without further attestation."

There can be no doubt but that the failure of the notary

public to affix his seal is fatal, so far as the certificate of acknowledgment is concerned. The notary public's certificate goes for naught without an authentication by his seal, and the mortgage stands upon the record as though no acknowledgment had been made.

A *scire facias* is a proceeding or writ founded on some matter of record, and the rule is, without exception so far as my examination goes, that the record must be complete in itself, and no testimony is admissible *aliunde*, for the purpose of making out a case. The object of the proceeding, though strictly statutory, is to vivify or vitalize what otherwise would lie dormant upon the record. A party gives a mortgage to secure the payment of money. In order to enforce that mortgage, prior to the enactment of this statute, the mortgagee must resort to a court of equity, or to his action of ejectment, to obtain possession of the property. But this statutory remedy comes in and allows him to vitalize the record, so to speak, where the mortgage has been *duly executed and recorded*, by a proceeding under the writ of *scire facias*. Now the question arises, what is an instrument duly executed and recorded? The extracts I have read from the statutes show clearly that in order to entitle an instrument to record, it must be acknowledged in the manner pointed out by statute. An instrument cannot be said to be duly acknowledged unless it is acknowledged in conformity with the provisions of the law, as indicated.

It is objected, however, to this view of the case, that, by the 28th section of the same chapter, from which I have read extracts, it is further provided that "deeds, mortgages and other instruments of writing, relating to real estate, shall be deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, though not acknowledged or proven according to law; but the same shall not be read as evidence, unless their execution be proved in manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof."

Now, this provision of the statute simply makes the deed or instrument, if recorded, notice to a subsequent purchaser or creditor; but it does not make a valid and complete record, because the record cannot be read in evidence without supplementary proof. The record is, therefore, incomplete, and the plaintiff cannot introduce his mortgage in evidence to sustain his writ of *scire facias*, without introducing with it evidence of the due execution of the instrument, in the manner required by law. It is as if no acknowledgment had been made, and it seems to me that the case is not brought within the provisions of the statute authorizing a proceeding under *scire facias*, because the instrument cannot be said to be duly executed and recorded unless it is so acknowledged as to entitle it to record, and so as to entitle the record to be read in evidence without further proof. We all know that many of the officers entrusted with the duty of recording instruments are not skilled in passing upon the sufficiency of acknowledgments, and therefore many instruments have crept upon the records which were not duly acknowledged; and this statute was passed, I think, in 1836 or 1837, probably for the purpose of protecting the rights of innocent purchasers who had placed their instruments upon record without having strictly complied with the laws in reference to acknowledgments; but I cannot conceive that this section of the statute repeals the preceding extracts which I have read, providing that an instrument, in order to be entitled to record, must be acknowledged in the manner pointed out. Therefore, I think *scire facias* cannot be maintained upon this instrument.

The demurrer will be sustained.

THE LAC LA BELLE.

DISTRICT COURT — EASTERN DISTRICT OF WISCONSIN — AUGUST TERM, 1872.

IN ADMIRALTY.

1. A vessel propelled in whole or in part by steam, having complied with the act of February 28, 1871, and the rules of the Board of Supervising Inspectors, and the Secretary of the Treasury, by placing on board a register adopted by said Board and Secretary, which proved defective and insufficient, and required frequent repairs, is not liable to seizure for having in use an imperfect register.

2. By purchasing one of the registers approved by lawful authority, the requirements of the law were complied with.

This was a motion to dismiss a libel of information filed against the steamer Lac La Belle, for not being provided with a proper steam registering gauge.

The facts are stated in the opinion of the court.

Levi Hubbell, U. S. District Attorney, for the United States.

Finches, Lynde & Miller, for respondents.

MILLER, J.: This libel of information brought by the district attorney charges that said steamer, having and carrying passengers on board, did navigate Lake Michigan between the port of Grand Haven, in the state of Michigan, and the port of Milwaukee, in the state of Wisconsin, in violation of the second subdivision of section eleven of the act of Congress, entitled "An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes,"—approved February 28, 1871, in this, that said steamer has not been provided with a steam registering gauge as required by the said act, and by the rules and regulations adopted and prescribed by the board of supervising

inspectors under and pursuant to said act. And a penalty of five hundred dollars is claimed, and for the payment of the same the steamer has been seized.

The said second subdivision of the act,[1] among other things directs that the inspectors shall satisfy themselves that there are on each steam vessel, "to indicate the pressure of steam, suitable steam registers, that will correctly record each excess of steam carried above the prescribed limit, and the highest point attained, which shall be taken wholly from the control of all persons engaged in navigating such vessel, and secured by the inspectors—*provided*, however, that no kind of instrument, machine, or equipment for the better security of life provided for by this act shall be used by any such vessel, which shall not first be approved by the board of supervising inspectors, and also by the Secretary of the Treasury." Pursuant to this provision of the act, the board of supervising inspectors of steam vessels, and the Secretary of the Treasury, adopted and prescribed rules and regulations, and names of certain instruments, machines, and equipments. Rule 95—"All steam registers required by law shall not be allowed to use any card, paper, or dial for recording the pressure and its variations, which shall need renewal oftener than once in every twelve months." And among the instruments, machines, and equipments adopted is the recorded steam gauge of E. H. Ashcrafts, of Boston.

The answer of claimants alleges that at and before the time of the seizure of the said steamer she had on board and in use according to the requirements of the said act of Congress, a recording steam gauge or register known and distinguished as E. H. Ashcrafts', of Boston, Massachusetts, which steam register had theretofore been approved and was then approved by the board of supervising inspectors of steam vessels for the United States, and the Secretary of the Treasury; and respond-

[1] 16 U. S. Statutes at Large, 444.

ent alleges that it has complied with the provisions of the said act of Congress according to its true intent and meaning.

The Ashcrafts register was proven to be on board this steamer at the time she was seized. The seizure was made on the ground that this register was defective in its construction, and did not comply with the requirements of the act of Congress, and rule 95 above quoted. The registers required by the act are to be located out of the reach of the officers of the steamboat, and in view of the passengers. They are to be under the control and subject to the examination of the inspectors. And by the rule, registers shall not be used which need renewal oftener than once in every twelve months. It is proven satisfactorily that the register in this steamer had been in use for a short time, and was found to be out of order. It was repaired by the manufacturer, and returned, and was put up again. On examination, it was found again out of order, and the register device refused to operate as required by law. The registering apparatus failed to perform its functions. The register pointer would move forward on an excess of pressure, and again on the return of the excess of pressure the pointer would move back to the point from which it started; while it should have remained at the point to which the pressure forced it in the excess of steam. The return of the pointer left no indication that there had been an excess of steam. If the difficulty was removed it would record each excess of steam up to ninety excess, ninety times, and then it would fail to operate until re-set, or re-adjusted. This could not be done without the inspector having access to it, as the law requires the government inspector to lock the register and keep it locked, and no one else to have access to it. The ninety excesses might be made within one week's time, or even less. This register would not be sufficient to run on this steamer for twelve months without repairing, and there would be no certainty in the ordinary use of the instrument of its coming anywhere near the requirements of the law. The Ashcrafts register is generally

defective in its construction, and it has not sufficient registering capacity to last twelve months.

For these reasons a certificate of sufficiency of the register used on this steamer was refused by the inspector, and the vessel was seized.

It is evident to me, from an examination of the testimony, that the steamer is not in fault, and that she cannot be adjudged liable to the penalty demanded. The claimant procured at its own expense a register approved by the lawful authority, and, on its failure, it was repaired at its expense.

It is a well settled principle that the citizen shall not be adjudged guilty of willful neglect of duty, or of violation of law, while faithfully submitting to the judgments or orders of officers of lawful authority. Citizens are not responsible for mistakes of government officers.

This case raises some doubts of the fulfillment of the requirements of the act of Congress, by the registers accepted, but some register may be produced by the ingenuity of man that may answer the purpose of the act. Owners of steamboats are not to be required to procure at their own expense all the registers adopted by the board of supervising inspectors. They comply with the law by purchasing and trying one of the adopted registers, and they should not be mulcted in a penalty for the insufficiency of the one purchased.

The libel of information must be dismissed.

THE OCEAN WAVE.

DISTRICT COURT—EASTERN DISTRICT OF WISCONSIN—AUGUST, 1872.

IN ADMIRALTY.

DUTY OF MASTER AFTER STRANDING.

1. After a vessel is stranded there is still an obligation upon the master to take all possible care of the cargo.
2. Where a barge is made leaky by an effort to remove her from a sand bar, it is the first duty of the master to stop the leak, and secure the cargo from the flow of water.
3. A shipper should not be required to prove negligence on the part of a master until evidence is given tending to show that the injury complained of came within an excepted clause in the bill of lading.
4. What constitutes unavoidable dangers of the river.

Libel by the Home Insurance Company of New York and the Merchants Insurance Company of Chicago against the steamboat Ocean Wave and the barge Bill Fleming, to recover the amounts paid by them on policies of insurance issued to Beaupre & Kelley on a cargo of bulk wheat shipped by them at St. Paul on the barge Bill Fleming, in tow of the steamboat Ocean Wave, to be transported to Prairie du Chien. The facts further appear in the opinion.

N. J. Emmons, for libellant.

J. W. Cary, for respondents.

MILLER, J.: The usual exceptions of unavoidable dangers of the river and fire were contained in the bill of lading. It is alleged in the answer of claimants, "that at a point on the Mississippi river, between Nebesha, in the state of Minnesota, and Alma, in the state of Wisconsin, and while passing in the

usual channel of the river and proceeding with due caution and care, the barge Bill Fleming struck a bar in the river and stuck fast, and the steamer and the other barge in tow, by their own impetus and the current of the river, were carried against the barge Fleming with great force, and caused the guards of the steamer to break down a fender part of the barge Fleming, tearing away the fastenings of the same below the water line of the barge, and crushing in the side of the barge. And an examination being made then and there, the barge was discovered to have sprung a leak and to make water freely."

The barge was new, well built, staunch and strong. The timber head of the barge was broke in, the bolts that her timber head were bolted with were driven through her side. The timber head was broken in, so that the top bolt of the timber head was driven through the sides, and the second bolt from the top nearly through; and the third bolt driven through the outside plank. The timber head is fixed in and fastened to the barge in its construction in this wise: "The bottom of the timber head is bolted to the bilge keelson and top timber, also two screw bolts run through the outside and the top timber, through the side clamps inside and the timber head, being one inch bolts, having a big flat head on the outside, fastened on the inside with a nut and a washer." The effect of the drawing of the bolts in the manner described was to make the barge leak through the bolt holes on to the wheat. Water did not show in the pump well until it had wetted the wheat, and ran down through the dunnage boards. The upper bolt was in a line with the water.

The barge ran on the bar at Beef slough in the forenoon of the day, in the month of May, and was taken off about six o'clock that evening, and towed down to Alma, about three miles, that night, when it was discovered that she had water in her, and pumping then commenced.

The usual way of getting barges off was not successful—that is to have lines from the barge to the boat, the boat backing and going ahead, sometimes one way and sometimes the

other way. The engineer of the steamboat testified, that they pulled at the barge until the guards were torn off the steamboat. The captain then ordered us to drive her off the bar by running the boat against her and butting her off. In doing so we drove in one of the timber heads of the barge. The barge was got off in that way and landed at Alma. One hundred and fifty pounds of steam to the square inch was used in butting the barge off. We made a line fast to the barge and steamboat, giving the line twenty feet slack. The boat drifted back that twenty feet with the current, and then came ahead with both engines strong, and butted the barge off. The barge was struck right against her timber head. The pilot of the steamboat corroborated in substance the testimony of the engineer. The captain saw the injury to the barge, and he had two carpenters on board. The leak could have been discovered by going into the hatch, or by looking into either of the scuttle hatches, or by use of the pumps, which would take water at two inches depth.

The answer does not state truthfully the cause of the injury to the barge. Not one particle of evidence supports the answer in this respect.

In my opinion, the answer does not bring the respondent within the exception of unavoidable dangers of the river. The answer merely alleges that while passing in the usual channel of the river, and proceeding with due care and caution, the barge Fleming struck a bar in the river and stuck fast. It is not alleged that the bar was unknown, or that it could not have been avoided. The barge struck a bar, in broad daylight, which was well known to the pilots. The case of *Transportation Company vs. Downer*, 11 Wallace, 129, is referred to as ruling this case. If the record of that trial had contained the facts proven by the master of the steamer, in which the plaintiff's coffee was stored, that he, the master, had not entered the harbor at Chicago for two years, and that he refused a tug, with the additional fact that the channel of the harbor was a shifting channel by means of sand, it is not probable that the

Supreme Court would have decided that that harbor was a peril of navigation. The master was a comparative stranger to that harbor, and was incompetent to navigate his vessel in. With proper knowledge and due care, with the aid of a tug, he could have avoided the accident. With these facts proven, the Circuit Court, in my opinion, could not consider the defendant as within the exception. The master must be competent to the discharge of his duties before the exception should be allowed. If that case, as reported, is adhered to as law, all that the owners of steamboats are required, in order to bring themselves within the exception, is to show that they encountered shallow water and stuck. Before a shipper should be put to prove negligence on the part of the carrier, the carrier should furnish evidence tending to show that the accident was unavoidable. The allegation in the answer that they were passing down the usual channel and proceeding with due caution and care, may be seen in substance in almost every answer. The boat may have been in the channel, but the barge not. The respondent must show that the boat and barge were in the usual channel, and that the injury was caused by an excepted cause.

The holes knocked in the barge should have been sought for and plugged without delay. The upper hole was visible, and the lower holes might have been discovered by feeling down in the water, and by going into the hatches the leakage no doubt would have been detected. The flowage of water on the wheat was not discovered for several hours after the barge had been towed to Alma. It was the first duty of the captain to use all means in his power for the security of the cargo. For his neglect there is no possible excuse. He is clearly in fault for the damage to the wheat, and a decree must be made for libellants.

That after the stranding of a vessel the master is bound to take all possible care of the cargo, consult *The Portsmouth*, Vol. 1 of this Series, 56.

That striking on a concealed snag, in the ordinary channel, and not known to pilots, brings the carrier within the exceptions in the bill of

lading of "unavoidable dangers of the river." *The Keokuk*, Vol. 1 of this Series, p. 522.

The carrier in order to relieve himself from liability for loss or damage must bring himself within the peril excepted in his bill of lading; and the burden of proof is upon him. *Clark vs. Bonnell*, 12 Howard, 272; *Chouteaux vs. Leach*, 18 Pennsylvania, 233; *King vs. Shepard*, 3 Story, 349; Abbott on Shipping, 478; 1 Smith's Leading Cases, 315 *et seq.*; Flanders on Shipping, § 257; Parsons' Maritime Law, 348; Chitty on Carriers, 242.

As to what constitutes unavoidable dangers of navigation, consult same authorities, and *The Northern Belle*, Vol. 2 of this Series, and authorities there cited.

For the right of a re-insurer who has paid the original insurer, to recover of the carrier, consult *The Ocean Wave*, August term, 1873, to appear in subsequent Volume of this Series. [*Reporter*.

MARSH vs. COMMISSIONER OF PATENTS.

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — SEPTEMBER, 1872.

IN EQUITY.

ABANDONMENT — LACHES.

1. Non-action during eighteen years on a claim for a patent which had been rejected at the Patent Office constitutes an abandonment to the public. This is true, even though meanwhile a patent for a similar invention had been declared invalid on the ground that this was a prior invention.

2. It is immaterial whether the rejection of his claim was right or wrong. If he insisted on his claim he should take some action on the subject within a reasonable time, either by an appeal from the Commissioner or by a bill in equity in the proper court.

3. The simple allegation in a bill in equity, under section 52 of the Patent Act, that the inventor did not abandon his claim to the public, is not enough to rebut the presumption to the contrary arising from the state of facts shown in the bill.

4. The 35th section of the patent act of July 8th, 1870, is to be construed with the implied limitation that the applicant had not previously, by abandonment or surrender, lost his rights.

5. This proviso was not intended to restore what had been voluntarily given to the public, or what had become the property of the public by the neglect or refusal for a series of years to prosecute what was originally a valid claim.

This was a bill in equity, filed by Hiram H. Marsh against Thomas Sayles and the Commissioner of Patents, under the 52d section of the revised patent law of July 8th, 1870, authorizing a bill in equity to be filed where a patent had been refused.

The defendants filed a demurrer to the bill, alleging several grounds, but only one was considered by the court, and is sufficiently stated in the opinion.

S. A. Goodwin, for complainant.

S. S. Fisher, for defendants.

DRUMMOND, J.: The facts, so far as it is necessary to state them, are as follows:

In July, 1851, Marsh, the plaintiff, made application for a patent for an improvement in cultivators, and his claim was rejected by the Office.

In November, 1851, he made application for, and there was refunded to him, twenty dollars of the duty fee which he had previously paid. In August, 1851, James Dundas applied for a patent for substantially the same improvement, which was, in December, 1852, rejected by the Patent Office. This rejection was some years after reconsidered, and in February, 1859, a patent was granted to Dundas.

In October, 1866, Dundas obtained a re-issue, and very soon after Thomas Sayles, one of these defendants, as assignee of the Dundas patent, filed a bill in this court against one Hapgood and others, to restrain them from infringing the letters patent of Dundas. In October, 1869, this court decided the Dundas patent invalid, because Marsh was the prior inventor.

Marsh did not know of the application and issuing of the patent to Dundas till 1865. He waited for the determination of the suit of *Sayles vs. Hapgood*,[1] and in December, 1869, renewed his application, and in November, 1870, his claim was rejected.[2]

In addition to these facts set forth in the bill, it alleges that Marsh never abandoned his invention to the public. No explanation whatever is given, other than as above, of the long delay except that he supposed the decision of the Commissioner, in 1851, was conclusive, and that he was wholly uninformed of his rights. And he insists that the Patent Office is estopped from setting up in bar of his renewed application the wrongful rejection of his claim, and the issuing of a patent to another.

Various objections are taken in the demurrer to the bill, but we will consider only one, viz.: That the bill does not make such a case as to entitle the plaintiff to the relief he seeks. And it seems to us that the legal result from the facts stated in the bill is, notwithstanding his denial to the contrary, that he did acquiesce in the action of the Patent Office in 1851, and therefore did abandon to the public whatever claim he might have; and according to the view we take, it is not material whether the rejection of his claim was right or wrong. Concede that it was wrongful, if he insisted on his claim he was obliged within a reasonable time to take some action on the subject, either by an appeal from the Commissioner, or by a bill in equity in the proper court.

In this case he made no motion for more than eighteen years after the rejection of his claim, during all which time his invention remained in the Patent Office with such description as he had chosen to give. We think the simple allegation that he did not abandon his claim to the public is not enough to rebut the presumption arising from this state of facts. It

[1] 2 Bissell, 189.

[2] Decisions of Commissioner of Patents, 1870, p. 151.

is not necessary to decide whether any satisfactory explanation could be given of so long a delay. It is not furnished in this bill. It is plain that in consequence of the decision in the case of *Sayles vs. Hapgood*, an attempt was afterwards made to recall an abandoned claim. To sustain this bill would be to vitalize many an old, forgotten claim that now lies buried under the rubbish of the Patent Office. We think it is no answer to say that for his invention Marsh ought to have had a patent; because the meaning of that is he ought to have had it, if he, within a reasonable time, and by the methods the law points out, had sought to obtain it.

The 35th section of the patent law of 1870,[1] declares that any person who has an interest in an invention where a patent was ordered to issue, on the payment of the final fee, and who has failed to make payment within six months from the time when it was allowed * * * shall have a right to make an application for a patent the same as in an original application: "*Provided*, That the second application be made within two years after the allowance of the original application." * * * "And, *provided further*, that when an application for a patent has been rejected or withdrawn prior to the passage of this act, the applicant shall have six months from the date of such passage to renew his application, or to file a new one, and if he omit to do either, his application shall be held to have been abandoned."

It is argued that the plaintiff is within the terms of this section, and that the second proviso applies literally to the facts of this case. It is true that the application of the plaintiff for a patent was rejected prior to the passage of the act, and it is insisted that the sequence to this is that the applicant has six months from the date of its passage to renew his application. This is in fact the letter of the proviso, and yet it must be true that it is subject to the implied condition that the applicant has not lost his right to make the application by abandonment or surrender of the same. It could not

[1] 16 U. S. Statutes at Large, 202.

have been intended to restore what had already been voluntarily given to the public, or what had become the property of the public, by the neglect or refusal for a series of years to prosecute what was originally a valid claim. Here the neglect or refusal had continued for more than eighteen years, and we cannot think that the proviso in the 35th section was intended to include a claim so stale as this. It may be admitted that, as stated in the last clause of the 35th section, abandonment is a question of fact, and we hold, notwithstanding the denial and pretexts to the contrary stated, that Marsh did in fact abandon his claim to the public; that such is the necessary conclusion from the allegations contained in the bill.

The demurrer will therefore be sustained.

BLODGETT, J., concurring.

RUGGLES vs. SIMONTON.

CIRCUIT COURT—WESTERN DISTRICT OF WISCONSIN—SEPTEMBER TERM, 1872.

JURISDICTION.

1. The United States Courts have not jurisdiction to restrain a Sheriff from selling under an execution issued from a State Court.

2. The State Court having first obtained jurisdiction of the property, its control is exclusive of this Court. Other claimants must try their rights in that tribunal.

3. This rule does not apply to proceedings against bankrupts, which rest upon different grounds.

The complainants, as mortgagees of the real and personal property, rolling stock, furniture and fixtures of the Southern

Minnesota Railroad Company, in trust, for securing the payment of the bonds of the said company, filed this bill to enjoin the defendant Simonton, the sheriff of the county of La Crosse, from selling certain cars and furniture of the railroad company, which he had seized and levied upon within his county, by virtue of an execution issued out of the state circuit court upon a judgment in favor of the other defendants herein, in a suit prosecuted by them, against the said railroad company, in said court, which were alleged in the bill to be covered by the mortgage of the railroad company to the complainants.

Upon filing the bill, an *ex parte* order was granted, staying the sheriff from selling under the execution, until the argument of the motion for an injunction, notice of which was given with the subpœna.

Demurrer to bill for want of jurisdiction, and motion to set aside order.

Hugh Cameron, for complainants.

Guy C. Prentiss, for defendants.

This property in dispute having been in the custody of the defendant Simonton, as sheriff, under legal powers from the state court, was in the custody of the law, and entirely under the control of the state court. This court has no jurisdiction over the same. Opinion of Judge Davis in case of *Watson vs. Jones*, 13 Wallace, 737; *Buck vs. Colbath*, 3 do., 341; *Hagan vs. Lucas*, 10 Peters, 400; *Taylor vs. Carryl*, 20 Howard, 594; *Freeman vs. Howe*, 24 do., 450; *Peck vs. Jenness*, 7 do., 612; *Payne vs. Drewe*, 4 East, 523; *Evelyn vs. Lewis*, 3 Hare, 472; *Noe vs. Gibbon*, 7 Paige, 513; *Northern Ind. R. R. Co. vs. Michigan Central R. R. Co.*, 15 Howard, 233.

This court has not jurisdiction of these parties. *Jobbins vs. Montague et al.*, 6 Bankruptcy Register, 117; *Hendesson vs. Ridgeway*, 17 Howard, 424; *Picquet vs. Swan*, 5 Mason, 35; *Toland vs. Sprague*, 12 Peters, 300; *Buchanan vs. Rucker*, 9 East, 103.

The plaintiffs are not parties to the payment while they seek to enjoin. *Payne et al. vs. Niles et al.*, 20 Howard, 219; *Williams vs. Byrne*, Hempstead, 472.

This court has not jurisdiction to enjoin proceedings in the state courts. *Ex parte Cabrera*, 1 Washington's C. C. R., 232; *City Bank of New York vs. Skelton*, 2 Blatchford, 14, 192; *Sawyer vs. Gill*, 3 Woodbury and Minot, 97; *Brown vs. Swan*, 10 Peters, 497; *Wynn vs. Wilson*, Hempstead, 698; *Marshall vs. Beverly*, 5 Wheaton, 313.

A mortgage for future advances is only good as between the parties. *Craig vs. Tappin*, 2 Sandford Chy. R., 78; *Farmer's Loan & Trust Co. vs. Commercial Bank*, 15 Wisconsin, 424.

HOPKINS, J.: The motion of the defendants to set aside said order has been very elaborately argued by the learned counsel for the respective parties, embracing a full discussion of all the main questions presented in the bill. The conclusions arrived at obviate an extended notice of all the questions discussed.

The counsel for the complainant relied upon the case of *Pennock et al. vs. Coe et al.*, 23 Howard, 117, as analagous, and as sustaining the right of the complainants to the relief sought. That case presents very much the same questions as this, except that in that case the property had been levied upon by the marshal of that court, and by virtue of its process, instead of by the sheriff of a state court, which the defendants' counsel insists distinguishes it from this case, and renders it inapplicable, and not authoritative upon the leading point raised by him here.

If this court has the right, within the legitimate exercise of its jurisdiction, to restrain the sale of property in the possession of a sheriff, under execution from a state court, to the same extent as it has to restrain the marshal from selling under process from this court, then I think that case decisive of this. It holds that a mortgage is valid upon after-acquired property; that such mortgage takes effect upon such property when put upon the road; that a bill in equity to restrain the sale of a

portion of the mortgaged property is a proper remedy by trustees under such a mortgage, and also that a remedy at law in such a case is not adequate.

But conceding all these questions relating to the merits of the case to have been decided in that case in favor of the complainants, the important question raised in this, as to whether this court has the right to enjoin the sheriff of the state court from selling property held by him upon an execution issued out of the state court, was not, in that case, presented nor decided, and its solution depends upon different principles than those passed upon in that case. Replevin would not lie in this court to take the property in controversy out of the possession of the sheriff.[1]

But it is argued that trespass will lie in this court against the sheriff for illegally taking the property, which is undoubtedly the case, and that a bill in equity may be maintained in any case to restrain the tortious act, when trespass will lie where the injury would be irreparable. Such is undoubtedly the general rule, and it is equally true as a general rule that replevin will lie where trespass will; yet the court, in *Freeman vs. Howe*, *supra*, hold that replevin would not lie in this court in such a case as this.

In this cause, as in replevin, the question of the conflict of jurisdiction between the state and federal courts is presented. The officer of the state court has the possession under the process of the state court, and is required to execute it by a sale, and is amenable to the state courts for its non-execution. His possession is deemed the possession of that court—a court of concurrent jurisdiction with this, and whose jurisdiction first attached by the seizure of the property upon its process. But it is said that the process only authorized him to take the property of the railroad company, and that he had no authority from the court or its process to take complainants' property, which is true; but that involves the right to hold the property

[1] *Freeman vs. Howe*, 24 Howard, 450.

under the process until the question of the right is determined, which can alone be decided by the state court, without producing an extremely hazardous conflict of jurisdiction in the administration of justice.[1] It is said in *Peck vs. Jenness*, 7 Howard, 625, "that neither (state nor federal) court can take the property from the custody of the other, by replevin or any other process;" and in *Freeman vs. Howe*, *supra*, that "in order to avoid unseemly collisions between them, the question as to which authority should for the time prevail, did not depend upon the rights of the respective parties, to the property seized, but which jurisdiction had first attached by the seizure and custody of the property under its process;" and in *Hagan vs. Lucas*, 10 Peters, 400, the court say, "property once levied upon remains in the custody of the law." The principle deducible from these cases is, that a seizure or manual occupation by an officer of a state court, by virtue of the process of a state court cannot be disturbed by the federal court or its officers, in order to try the rightfulness of the taking or possession.

The case of *Buck vs. Colbath*, 3 Wallace, 335, does not lay down a different doctrine. It simply holds that trespass can be maintained in state courts against a marshal for wrongfully taking the property of a third party upon an execution, that the process does not protect him in such a case, as it only directs him to take the property of the defendant in the writ. That decision is not in conflict with the other decisions of the court herein before referred to, as in such an action there is no interference with the possession of the property attached, and in that case it is remarked that the principle of non-interference with the possession of an officer of another court, "is essential to the dignity and just authority of every court, and to the comity which should regulate the relations between all courts of concurrent jurisdiction.

That whenever property has been seized by an officer of the

[1] *Taylor vs. Carryl*, 20 Howard, 583.

court by virtue of its process the property is to be considered as in the custody of the court, and under its control for the time being, and no other court has a right to interfere with that possession, except a court of supervisory authority."

Such being the settled doctrine of the federal courts, upon what principle can it be maintained that they can interfere by injunction with the execution of the process of state courts? An injunction restraining the sale is an interference with the possession, and is the assertion of a right of control over the property in the custody of another and independent court of concurrent jurisdiction, as derogatory to its dignity and authority as a manual taking would be.

While property remains in the custody of a court, taken by virtue of its process, that court must have the exclusive control of it, especially as against a court of another jurisdiction. This is absolutely essential to the harmonious exercise of our intricate system of state and federal jurisprudence.

If this court can interfere by injunction to restrain the execution of the process of the state courts, the state courts can retaliate and enjoin parties from proceeding in this court, and in that way defeat absolutely the right of suitors to proceed in any court. Such a state of things would be intolerable, and to avoid such conflict the federal and state courts should refrain altogether from interfering with the possession of property in the custody of the other, and from all attempts to control or investigate the right to hold such possession, as their judgments could not be enforced, if differing from those of the court having the custody, without bringing on the conflict so much to be deprecated.

The act of Congress of March 2, 1793, 1 Statutes at Large, 335, section 5, forbids the granting of an injunction to stay proceedings in a state court. This, as construed in *Diggs vs. Wolcott*, 4 Cranch, 178; *Watson vs. Jones*, 13 Wallace, 679, and *Peck vs. Jenness*, *supra*, is conclusive against the authority of this court to grant an injunction to stay the sale of the property by the sheriff upon the execution by virtue of which

he seized and holds it. A sale by a sheriff upon execution of property seized by him is a "proceeding" in the state court within the meaning and prohibition of the act above mentioned. As this point is fatal to the continuance of the order staying proceedings, the motion of defendant is granted and the order set aside and vacated. The right of United States district courts sitting in bankruptcy to stay proceedings in suits against the bankrupt and his property rests upon other grounds which are not necessary to be stated here.

This decision may result in the dismissal of the bill upon the defendant's demurrer, unless under the general prayer for other relief, the court can enter a decree other than of perpetually enjoining the sheriff from selling upon the execution.

Where the Supreme Court of a state has taken judicial control of the property and franchises of a corporation, and ordered their sale, they cannot be taken in execution by process from any other jurisdiction. *Fox vs. Hempfield Railroad Company*, 2 Abbott, 151.

For a discussion of this principle as applied to admiralty jurisdiction, see *The Celestine*, Vol. 1 of this Series, p. 1, and cases there cited.

An assignee in bankruptcy cannot maintain an action in a Federal court against a state sheriff to recover property taken by him upon attachment duly issued out of a state court before the commencement of bankruptcy proceedings. *Johnson vs. Bishop*, 1 Woolworth, 324.

The sheriff's possession is that of the court of which he is an officer, and no other court will interfere as long as the proceedings are pending. *Ib.*

As to the respective rights of the assignee and claimant under state proceedings, consult the recent decision of the Supreme Court, *Marshall vs. Knox*, American Law Register, October, 1873, where it is held that the assignee cannot interfere with the possession of goods taken under execution, nor under claim of right either of property or possession, nor can such claimant or officer be brought within the jurisdiction of the court of bankruptcy by summary process. [*Reporter.*

AKERLY vs. VILAS.

CIRCUIT COURT—WESTERN DISTRICT OF WISCONSIN—SEPTEMBER 1872.

IN EQUITY.

CASES REMOVED FROM STATE COURTS.

1. TRIED UPON ORIGINAL PLEADINGS.—An action removed after issue joined, from the state to the Federal courts, under the act of July 27, 1866, as amended by the act of March 2, 1867, must be tried in the Federal courts upon the pleadings certified from the state courts, and the same force and effect must be given to them by the Federal courts as in the state courts if the case had remained there.

2. ALL RIGHTS AND DEFENSES PRESERVED.—In such a case the cause stands in the Federal courts as it stood in the courts of the state, the former clothed with the powers of the state courts, and all rights acquired by, and all defenses allowed under the state laws are to be recognized in this court.

3. Congress did not intend by these statutes to allow either party to obtain a practice or ruling more favorable to them, or when dissatisfied in the state court to obtain a trial *de novo*.

4. INTERLOCUTORY ORDERS MAY BE REVISED.—The decision of a court upon a motion does not partake of the quality of a judgment in such a sense as to preclude the same court from a further examination of the same question. The proceedings before judgment are within its control, and orders made may be revised, and vacated or set aside.

5. ESTOPPEL.—The doctrine of estoppel does not go so far as to preclude a further inquiry and a rehearing of a motion upon an enlarged state of facts, nor prevent this court from revising an order made in the case while pending in the United States Circuit Court for the district from which it had been removed.

6. The doctrine of *res adjudicata* considered.

This was an action commenced in the circuit court of Dane county, in the state of Wisconsin, in 1860, to foreclose a mortgage given by the defendant to plaintiff and one Mrs. Lord, she having assigned her interest to plaintiff. The

defendant answered, setting up various defenses and counter claims, among others an alleged breach of covenant by the plaintiff, for which he claimed damages in the sum of $100,000, stating that the mortgage was given to secure a part of the purchase price of certain real estate conveyed by plaintiff to defendant by deed, containing covenants of quiet enjoyment and general warranty, and averring a breach thereof by the plaintiff. The circuit court struck out the counter-claim, but on appeal the supreme court of the state held it well pleaded under the state practice, and remanded the case for further proceedings. After such decision, and after the testimony had been taken upon the issues made up in the state court, the plaintiff procured a removal of the case to the United States Circuit Court for the district of Wisconsin, under the act of March 2, 1867. For opinion on this removal consult Volume 2 of this Series, p. 110.

The plaintiff, by reason of an order of the state circuit Judge, prohibiting the clerk from furnishing copies of the pleadings and proceedings in the case in that court, was unable to obtain certified copies of the record, etc., from the state court, but the United States court allowed sworn copies to be filed in lieu thereof, and thereupon entered and docketed the case. The plaintiff then filed a new bill and the court entered an order or rule that defendant plead or demur thereto. Defendant moved to strike it from the files, which motion was denied.

The defendant then answered on the merits and plaintiff excepted. Before the exceptions were passed upon, the defendant obtained an order, under the 6th section of the act dividing Wisconsin into two districts, transferring the case from the eastern to this district.

After the transcript of the record of the eastern district was filed in this court, the defendant moved for an order that plaintiff procure and file *certified* copies of the process, pleadings, etc., from the state court, which motion was granted, and such copies were procured and filed.

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The defendant then answered on the merits and plaintiff excepted. Before the exceptions were passed upon, the defendant obtained an order, under the 6th section of the act dividing Wisconsin into two districts, transferring the case from the eastern to this district.

After the transcript of the record of the eastern district was filed in this court, the defendant moved for an order that plaintiff procure and file *certified* copies of the process, pleadings, etc., from the state court, which motion was granted, and such copies were procured and filed.

The defendant then moved for an order striking out all the pleadings filed in the federal court, and directing the action to be tried on the pleadings and issues made up in the state court. The plaintiff, at the same time, moved that his exceptions to the defendant's answer (which contained the same matters of defense and counter claims as the answer filed in the state court) be allowed.

The case is reported, in its various phases, in 15 Wisconsin, 401; 21 do., 88 and 377; 23 do., 207; 25 do., Appendix A.

Finches, Lynde & Miller, for complainant.

Wm. F. Vilas & P. F. Spooner, for defendants.

HOPKINS, J.: This case, as presented by the motions of the respective parties, involves but two questions requiring consideration at this time.

First—Does the act of July 27, 1866, (2 Brightly, 115,)[1] as amended by act of March 2, 1867, (Brightly, 116,)[2] providing for the removal of certain cases from the state to the federal courts for trial, authorize or allow the parties to file new pleadings in the federal courts, or to change the issue made up in the state courts before removal?

Second—If not, is this court estopped by the orders made while in the circuit court of the United States, before the removal of the cause to this district, one, requiring the defendant to answer the new bill filed in that court, and the other, denying a motion made by the defendant to strike such bill from the files?

Another important question might arise, if the court should reach that point, viz.: Whether the decision on those motions involved or settled the kind of answer, or the matter of the answer, the defendant might put in.

It seems to me, if it should be necessary to consider this,

[1] 14 U. S. Statutes at Large, 306.
[2] 14 U. S. Statutes at Large, 558.

that the alleged estoppel might be found not to extend to or embrace the questions presented on this motion.

The defendant answered, setting up the history of the case in the state courts, and the same defenses that he set up in the state court, upon which the various proceedings recited therein had been had.

The complainant filed exceptions to that answer, which present the question, for the first time, it seems, to me, as to the kind of defense and answer the defendant might interpose in this court; or, in other words, whether the case should be tried upon the issues made up in the state court, or whether it should be considered as commenced *de novo*, and new pleadings be filed containing only such matters of defense as are permissible under the practice and pleadings of this court in cases originally commenced herein. This is the important question and it requires careful consideration.

The practice, where a case was removed to the federal court, under the judiciary act of 1789, (1 Brightly, 128,)[1] in states where the statutes had changed the common law forms, was to file new pleadings. That act, however, only required the party removing to file copies of the *process*. Section 12. And, as under that, the application had to be made on the defendant's entering his appearance, it was before he had plead, or taken any steps in the case. So the courts had to treat it as a case just commenced in the federal courts, and apply to it the practice existing there.

The act under which this case was removed is essentially different from that in many respects, and requires a very different practice.

The act under which this case was removed authorizes the application to be made *after issue joined*, and requires the party petitioning for removal to give bail to enter in the federal court copies of all *process, pleadings, depositions, testimony*, and other proceedings in said suit. The act to which

[1] 1 U. S. Statutes at Large, 79.

this is amendatory declares that "all *pleadings* filed or entered as aforesaid in the United States court by the defendant applying for the removal of the cause, shall have the same force and effect in every respect and for every purpose as the original pleadings would have had by the laws and practice of the courts of such state if the cause had remained in the state court." In that act, as in the amendment to it, the following provision is contained: "And said copies being so entered as aforesaid, in such court of the United States, the cause shall then proceed in the same manner as if it had been brought there by original process." This, the plaintiff's counsel claims, makes it necessary to treat the case as just commenced in this court by the service of process, and to take the usual proceedings as from that point. I cannot concur in that view. Full effect is given to that provision by holding it to mean that the jurisdiction of the court over the parties and the subject matter is as complete when brought in in that way, as when obtained by the service of original process.

The same phrase or sentence is in the original act of 1789, and in the act of 1866, and Congress could not have intended it should receive any such construction, for then it would conflict with the provision in the last act declaring what were the force and effect of the pleadings filed in the state courts. The act of 1867 being an amendment of the act of 1866, according to the rule for the construction of amendments to statutes, is to be read as if incorporated into the original act, which would make the clause in that act prescribing the effect to be given to the pleadings in the state courts applicable alike to cases of removal under the amended act.

Thus construed, they mean that all proceedings necessary *after* the removal to a final trial or hearing shall be conducted in the same manner, and the case, as to such proceedings, shall be regarded as if originally commenced in this court. In the language of the statute, "the state courts shall proceed no further therein, and the suit shall thereafter proceed in the federal courts." If it were not so, and the proceedings were

not to stand as the pleadings in the cause, why require copies to be filed? What was the object of this change from the judiciary act of 1789? That only required copies of the *process* to be filed; this, copies of the *process*, *pleadings*, *depositions*, *testimony* and *proceedings*.

I cannot construe the statute otherwise than that the issues made up in the case on its removal remain and constitute the issues to be tried in the federal courts; and as a necessary consequence, all the rights secured by either party under the practice and laws of the state where the suit was commenced, are impressed upon the case, and as full effect must be given to them in the federal as would have been given by the state courts if tried there. And by this is meant nothing more than this—that when the case is removed, it stands in the federal court as it stood in the inferior and appellate courts of the state, the federal courts clothed with the powers of all the state courts through which the case might pass, but subject of course to the limitations existing under our mixed system, and giving the proper effect only to the adjudications of the highest court of the state, as well in the past as in the future progress of the case. There is no hardship in this construction. A non-resident plaintiff *voluntarily* commences a suit in the state court when he might sue in the federal court. He therefore has no reason to complain. A non-resident defendant, when sued in the state courts, may remove before pleading, if he chooses; so he cannot complain. Therefore, to hold, after such voluntary action of the parties, that all rights acquired by, and all defenses allowable under the state laws, are to be recognized and preserved in the federal courts, is not inflicting any hardship upon either party, certainly not on the party entitled to a removal.

The opinion of the court, by CHASE, Ch. J., in *West vs. The City of Aurora*, 6 Wallace, 139, a case removed from the state court of Indiana on application of plaintiff after plea by defendant, seems especially applicable upon this point. In that he says: "They (the plaintiffs) were bound to know of

what rights the defendants to their suit might avail themselves under the code (of Indiana.) Submitting themselves to its (the state's) jurisdiction, they submitted themselves to it in its whole extent."

The same doctrine is laid down in *Thompson vs. Railroad Companies*, 6 Wallace, 134. By the statutes of Ohio, a suit was authorized to be prosecuted in the name of the real party in interest, which was not the rule in the United States courts. The case was properly commenced under the Ohio statute, and the Supreme Court, in passing upon the effect to be given to that statute, say, "if they could have maintained it in their names in the state court, they had an equal right to maintain it in their names when it arrived in the federal court."

So the fact that the defendant's answer contains defenses which would not be allowable in actions originally commenced in this court, does not determine the question of his right to interpose such an answer.

If such defenses are pleadable in the state courts, they must be allowed in this court, for all the rights acquired by the defendant under the state laws before removal, are, and must be, recognized and preserved here as sacredly as in the state courts. In such cases the federal courts have to look to the state laws and practice to determine the sufficiency of the pleadings.

This construction prevents abuse, while the other would allow parties to speculate and experiment upon their chances in the state courts, and, if they found the state law gave their adversaries more privileges than they would have under the practice and system of pleadings in the federal courts, they would remove their cases to that court, and thus strike out the pleadings and defenses they might not like, and commence and continue their case upon a theory better suited to their purposes.

The act does not permit any such injustice. It allows the removal of the case to the federal courts for trial in the condi-

tion it is in when removed, and provides for finishing it up from that point in those courts.

It does not confer upon the court appellate, but only original jurisdiction, concurrent with the state courts. The case is transferred *cum onere*. It may, therefore, be conceded that the defenses set up in this answer would not be admissible under the system of pleadings and practice of this court. But that does not dispose of the question under consideration, for Congress has the power to change the form of pleadings, and adopt any system of practice and pleadings it may choose. That matter is wholly within its discretion. This it has recently done in cases other than those of equity and admiralty, and there is no doubt it could change the forms of pleadings in those cases also. Act of June 1, 1872. And it may fairly be held that by providing for the removal of cases after issue joined, they intended to establish or allow a different practice in such cases; to accept the pleadings made up in the state courts, and to try such cases on those pleadings, and, to that end, the pleadings, testimony, and all proceedings were required to be certified so that the federal court can take up the case in the condition it receives it, and try it, so far as the pleadings are concerned, as it would have been tried in the state courts, preserving to the respective parties all their constitutional rights.

This construction gives force and effect to all of the provisions of the act, and seems to be its natural meaning.

The removal is allowed because it is feared that a fair trial cannot be had from "prejudice or local influence," not because the statutes of the state in reference to the practice of its courts is different from the practice of this court. Congress did not intend to condemn the codes and mode of procedure in the state courts, either as unsuited or inadequate to the attainment of justice.

The object of the statute was to secure an impartial trial of the case, having reference to the tribunal, the courts, or juries, not the systems of practice that might exist in the

several states. It did not intend to allow a case to be removed because a state might adopt the code, or allow to defendants additional defenses to those permitted in the federal courts.

This case would furnish as striking an illustration of the injustice of an opposite construction as could well be supposed. It had been pending and severely litigated in the circuit and supreme courts of this state for a period of eight years before removal. It had been repeatedly before the supreme court of the state. The pleadings had been considered and sustained by that court, as in accordance with the statutes of the state. The testimony bearing upon the issues had been taken by both parties. Now, to allow a removal of the case, at that stage, to this court, and to reject all the pleadings, decisions and proceedings had in the case before removal, and commence *de novo*, would be a reproach upon our system of jurisprudence. But it is argued by the plaintiff's counsel, that if this construction is correct, as an original proposition, the court is estopped from so holding, because of the order of the circuit court of the United States, before removal here, denying the motion to strike from the files the bill filed therein, after the removal from the state court. It therefore becomes necessary to examine whether or not this court is thus restricted.

It is undoubtedly true that courts very seldom re-hear a matter or review a decision made upon a motion upon the same facts; yet they may. The conclusive effect of a judgment of a court of competent jurisdiction is not questioned. But the question here is, whether that rule embraces this case. Did that decision partake of the quality of a judgment in such a sense as to bring it within the doctrine of *res adjudicata*, so as to preclude that court, if this cause had continued before it, from further examining the question presented here; and if it did not, then this court is not estopped, for it has the same control over the case as the other court would have had, and is not estopped to any greater extent than that, and it is its duty to decide all questions that may be presented, and it cannot avoid that responsibility on the ground of estoppel, unless the

decision clearly brings it within the established rules on that subject. It cannot rightly withhold its judgment on the ground of courtesy or comity unless the former decision is final. The most generous comity does not require one court to give to the decision of another court of concurrent jurisdiction any greater force than the court pronouncing it. Comity does not enlarge the conclusive operation of the doctrine of *res adjudicata.*

It therefore becomes necessary to examine the cases and ascertain what are the rules on the subject of *res adjudicata*, and to what cases, and under what circumstances they are to be applied. The reported cases have left the question in some doubt and confusion. The United States Supreme Court, in *Breedlove vs. Nicolet*, 7 Peters, 413, in effect hold that decisions upon motions are not final or absolutely binding upon the court in the further progress of the cause. In that case, after several pleas in bar, the defendant offered, and was allowed by the court, to plead in abatement to the jurisdiction; and afterwards, and on the trial, that plea was disregarded and taken from the files of the court, although it had been placed there by order of the court. On error to the supreme court the point was distinctly taken, "that the plea to the jurisdiction was lawfully filed, and ought not to have been taken from the files by the court." On that question, MARSHALL, C. J., said: "All the proceedings are supposed to be within the control of the court while they are in paper, and before a jury is sworn or a judgment given. If so, the orders made may be revised, and such as in the judgment of the court may have been irregularly and improperly made, may be set aside." In that case, the court had ordered the plea to be filed, which was on the trial disregarded and taken off. In this case the court denied the motion to strike the bill from the files. No distinction is perceivable in the cases, so far as the question of the power of the court is concerned, and it seems to me, according to the doctrine of that case, that the orders relied upon in this do not deprive the court of the power of recon-

sidering those questions and of vacating those orders, if it thinks it right to do so. Such being my understanding of that case, the plaintiff's objection on the ground of estoppel cannot be sustained. Nor is this doctrine without support in other well-reasoned cases. In *Simpson vs. Hart*, 14 Johnson, 62 and 76, SPENCER, J., who delivered the opinion of the Court of Errors, in speaking of decisions upon motions, say: "In the same court these decisions are not considered so final and decisive as to furnish a bar to another and further decision of the question. Courts, to prevent vexatious and repeated applications upon the same point, have rules which preclude the agitation of the same questions upon the same state of facts. These rules are for the orderly conduct of business, and are not founded upon the principle of *res adjudicata*."

This language was used in the case of a bill in equity, filed to set off judgments obtained in different courts. It was objected that because a court of law which had jurisdiction had denied a motion to accomplish the same object, that a court of equity could not grant the relief asked. But the court held that the decision of the motion did not bar the suit; that such application, and the decision thereon, did not partake of the quality of a judgment, so as to be a bar, on the ground among others, "that the same court might, with entire propriety, hear a new discussion of the question."

But there is another answer to the pretended estoppel. The doctrine of estoppel does not, within any rule, go so far as to prevent further inquiry and a re-hearing of a motion upon an enlarged state of facts. The decision of a court upon a motion is received as an estoppel only upon facts exactly similar. The case must be exactly commensurate with what it was when the prior order was made.[1] By this language it will be seen with what strictness the courts apply the rule when they recognize its existence.[2] That construction defeats the estop-

[1] *The People vs. Mercein*, 8 Hill, 399, 416.

[2] *Mitchell vs. Allen*, 12 Wendell, 290; *Dollfus vs. Foosch*, 5 Hill, 493.

pel set up here. This case is changed; it is not in the exact condition it was when the orders relied upon were made. At that time certified copies of the pleadings in the state court were not filed. Since then the defendant has answered, and the plaintiff has excepted to it, and this court has granted an order after argument requiring the plaintiff to procure and file copies of process, pleadings, etc., which has been done, so that the pleadings and proceedings had in the state court are now for the first time before this court in an authentic form. I think, therefore, the case is so far changed on this motion that this court, within the most generous extension of the doctrine of *res adjudicata*, is not estopped from entertaining and deciding the questions now presented. But, as I at first suggested, I do not see how the decision relied upon could be extended so as to include and determine the question as to what kind of an answer the defendant might interpose. That could not properly be considered until the answer was filed.

I therefore think the motion of the defendant should be granted.

The Federal courts follow the state practice in cases removed under the acts of Congress. *Republic Insurance Company vs. Williams, post*, 370.

Also, in many respects, in pleadings and practice in bankruptcy proceedings, *In re Findlay*, November, 1873, to appear in subsequent Volume of these Reports.

That Congress did not intend to allow a party dissatisfied with the ruling of the state court to obtain a more favorable tribunal, or a trial *de novo*, consult *Kingsbury vs. Kingsbury, ante*, p. 60.

That at any time previous to final decree, all interlocutory orders are subject to examination and revision, see *Pullan vs. Cincinnati and Chicago Air Line R. R. Co.*, May term, 1873, to appear in subsequent Volume of these Reports.

After a judgment in the state court which has been reversed by the appellate court and a new trial ordered, the case can be removed, *Dart vs. McKinney*, 9 Blatchford, 359.

But if in a chancery proceeding the decree is reversed, and the cause remanded with instructions to the court below to dismiss the bill, an application for removal comes too late. *Boggs vs. Willard, ante*, p. 256.

[*Reporter.*

THE SELT.

DISTRICT COURT—EASTERN DISTRICT OF WISCONSIN—OCTOBER TERM, 1872.

IN ADMIRALTY.

1. LIBEL AGAINST DOMESTIC VESSEL.—Under the twelfth rule in admiralty, as amended by the Supreme Court at the December Term, 1871, a libel can be maintained for repairs and supplies furnished to a domestic vessel at the home port.

2. *Obiter*, the lien would only attach at the date of seizure.

3. MORTGAGEE MAY DEFEND.—In the absence of the owner, a mortgagee may be permitted to appear as claimant.

4. MEANING OF RULE 12.—The alteration of rule 12 was intended to place contracts for repairs and supplies for *all* vessels on an equality as to proceeding in admiralty, not to abrogate the distinction between a domestic contract and a maritime lien. The alteration applies to the character of the process to be used, not to the question of jurisdiction.

5. ADMIRALTY RULES.—The rules established by the Supreme Court are rules of practice, not of decision.

This was a libel by William H. Wolf and Thomas Davidson, ship-builders and proprietors of dry docks in the city of Milwaukee, to recover for repairs and supplies furnished during the year 1872 to the scow Selt, a vessel owned in said city.

The owner of the vessel not appearing, Osuld Torrison, a mortgagee, was allowed by the court to appear as a claimant, and answer the libel.

The answer alleged that the libellants had no maritime lien upon the vessel, and no lawful right to bring or maintain their libel, the said vessel being owned at the port of Milwaukee by a resident of said city, and that the repairs and materials were performed and furnished in said city, at the instance and request of the owner of the vessel.

The respondent further alleged and propounded that one Patrick Hoye, by a mortgage dated December 23, 1869, con-

veyed said vessel to him to secure a portion of the purchase price of the vessel, and that the mortgage was recorded in the office of the collector of customs, in the city of Milwaukee, on the 24th of the same month, under which mortgage he claimed title to said vessel paramount to the claim of the libellants.

The facts pleaded were not disputed.

H. H. Markham, for libellants.

Emmons & Hamilton, for respondent.

MILLER, J.: A maritime lien was considered the foundation of proceedings *in rem* when admiralty and maritime jurisdiction was conferred upon the federal courts. Such proceeding was to make perfect a right incohate from the moment the lien attached. When a maritime lien existed, a proceeding *in rem* was the proper course to carry it into effect. An act of Congress, approved September 29, 1789, entitled "An act to regulate process in the courts of the United States,"[1] directed that the forms and modes of proceeding in causes of admiralty and maritime jurisdiction should be according to the course of the civil law. By the act of May 8, 1792,[2] it is provided, "That the forms of writs, executions and other process, except their style and the forms and modes of proceeding in suits in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the act entitled 'an act to regulate processes in the courts of the United States,' in those of equity, and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity, and to courts of admiralty, respectively, as contradistinguished from,courts of common law, except so far as may have been provided for by the act to establish the judicial courts of the United States, subject, however, to such alterations and additions as the said courts respectively

[1] 1 U. S. Statutes at Large, 93.
[2] 1 U. S. Statutes at Large, 275.

shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same."

The power here conferred on the Supreme Court was enlarged by an act of Congress, approved August 23, 1842.[1] Pursuant to the authority of these two acts of Congress, the Supreme Court of the United States at the January term, 1842, adopted rules of practice for the courts of admiralty. One of these rules is this rule 12. "In all suits by material men for supplies or repairs, or other necessaries, for a foreign vessel or ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or the owner alone *in personam*. And the like proceeding *in rem* shall apply to cases of domestic ships where, by the local law, a lien is given to material men for supplies, repairs or other necessaries."

At the December term of the Supreme Court, 1858, the said twelfth rule of practice was repealed, and the following rule was substituted in its place: "In all suits by material men for supplies or repairs, or other necessaries, for a foreign ship or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*. And the like proceeding *in personam*, but not *in rem*, shall apply to cases of domestic ships for supplies, repairs, or other necessaries." If this rule had not been repealed nor modified, these libellants could not maintain this libel *in rem*. But at the December term of the Supreme Court of 1871, the said twelfth rule was amended so as to read: "In *all suits* by material men for supplies or repairs, or other necessaries, the libellants may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*." This libel is brought under this last rule.

The ninth section of the act to establish the judicial courts

[1] 5 U. S. Statutes at Large, 517, § 6.

of the United States[1] confers upon the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." The English rules, that were supposed to exist at the date of the adoption of the Constitution of the United States, and when the above mentioned act was passed by Congress, that the admiralty jurisdiction did not extend beyond tide waters, and that proceedings *in rem* could only be sustained for the adjudication of a maritime lien, have been exploded. The admiralty and maritime jurisdiction granted to the federal government by the Constitution of the United States, is not limited to tide waters, but extends to all public navigable lakes and rivers where commerce is carried on between different states and with foreign nations.[2] Liens by bottomry bonds, for seamen's wages, salvage service, and for supplies or repairs in a foreign port, are supposed to be founded on contracts upon the credit of the vessel, and are distinguished from contracts at the home port of the vessel, which are contracts on shore on the credit of the owner. Contracts at the home port for repairs, supplies or the use, or insurance of a vessel, are now considered as maritime contracts cognizable in the admiralty. In the case of the *Moses Taylor*, 4 Wallace, 411, it is announced that the distinguishing and characteristic feature in a suit in admiralty is that the vessel proceeded against is itself seized and impleaded as a defendant, and is judged and condemned accordingly. And in *The Hine vs. Trevor*, Id. 555, and in *Insurance Company vs. Dunham*, 11 Wallace, 1, it is stated that the true criterion, whether contracts are within the admiralty and maritime jurisdiction, is their nature and subject-matter, as whether they are maritime contracts having reference to maritime service, maritime transactions, or maritime casualties, without regard to the place where they are made. In view of these principles it was held in this case that the contract of marine

[1] 1 U. S. Statutes at Large, 73.

[2] *The Genesee Chief*, 12 Howard, 443, and many subsequent decisions.

insurance is a maritime contract within the admiralty and maritime jurisdiction, *in personam*.

I think it is now settled that these libellants can maintain their libel *in rem*, for the recovery of their claim for repairs and supplies. The question is not presented in this case whether the lien attached at the date of the work done and the supplies furnished, or by the attachment under the monition. My impression at present is that the rule merely extends a remedy to a domestic creditor, and that his lien attaches by the seizure.

It is clear that a mortgagee of a vessel has no maritime lien, nor remedy *in rem*, in the admiralty courts. The mere mortgage of a vessel, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it without reference to navigation or perils of the sea.[1]

The record of the mortgage set up in the answer makes it a legal lien, but not a maritime lien. The mortgagee, as such, cannot proceed in this court *in rem* for the condemnation and sale of the vessel. After a sale of a vessel under an admiralty decree, the mortgagee can petition the court for payment out of remnants and surplus.

A legal title passes conditionally by the mortgagor to the mortgagee, and it is more equitable to pay out of the registry the surplus of proceeds of sale of a vessel to a mortgagee, than to the owner of the equity of redemption.

The mortgagee was allowed as the conditional owner of the vessel, and in the absence of the mortgagor, to appear and set up his mortgage, and claim that it is a legal lien on this vessel, prior in date to the attachment under the libellants' monition, and also prior to their contract propounded in their libel.

The state law provides for a lien for supplies and repairs upon boats and vessels used in navigating the waters of the state, and authorizes proceedings *in rem* against said boats and

[1] *The John Jay*, 17 Howard, 399.

vessels. Whether this law has any validity as authority for such proceedings in the state courts, I need not decide. Since the cases of *The Belfast*, 7 Wallace, 624, *The Moses Taylor*, and *The Hine vs. Trevor*, it is nugatory as authority for such proceeding in this court. The states can neither enlarge nor limit the admiralty and maritime jurisdiction of the federal courts. The Constitution and laws of the United States necessarily conferred exclusive admiralty and maritime jurisdiction upon the federal courts for the protection of commerce and for the preservation of amicable commercial relations with foreign nations. This vessel is libelled as a national enrolled and licensed vessel used in navigating the lakes, and is not within the scope of the state law.

The libellants might have proceeded in the state court against the owner of the vessel, or in this court, *in personam*, and before the modification of the rule, they would have had to make choice of these remedies.

A sale of the vessel under an execution against the owner, issued from either of the courts, might not disturb the mortgagee's interest. The modification or alteration of rule 12 was no doubt intended to place contracts for repairs and supplies for all ships and vessels on an equality as to proceeding in the admiralty, whether foreign or domestic. All distinction in regard to proceeding *in rem* is abolished; but I do not suppose it was intended by the Supreme Court to abrogate the distinction between a domestic contract for supplies and repairs and a maritime lien upon a foreign vessel. The alteration of the rule, in my opinion, applies to the character of the process to be used, and has no relation to the question of jurisdiction. The rules established or altered by the Supreme Court, under legislative authority, are not rules of decision, but are merely rules of practice, prospective in their operation.[1] In that case it is decided that the change of the rule in the year 1844, prohibiting a proceeding *in rem* on domestic contracts, could not

[1] *The Steamer St. Lawrence*, 1 Black, 522.

interrupt the prosecution of a libel pending on such a contract. But in this case the mortgagee rested upon his mortgage and its record, without having either instituted proceedings for the recovery of the amount secured, or having taken possession of the vessel under his mortgage. The mortgagee had knowledge of the repairs being made on the vessel by the libellants, who thereby made her a more valuable security. And it appears that the libellants, with knowledge of the mortgage, expended a large amount in supplies and repairs, under the belief that they had a right to attach the vessel.

By the ruling in the case of the *Island City*, 1 Lowell's Decisions, 375, the mortgage would be postponed to the claim of the libellants, upon the ground of a lien created by the state law. But in this case there is no such lien. It appears that the vessel was a wreck, affecting the security of the mortgage, and that the repairs have restored her to usefulness. I think, upon principles of equity, these parties should be placed on an equality as to the distribution of the proceeds of sale. The proceeds of the sale of a vessel are not appropriated to liens, according to their priority in date. The seamen who brought a vessel into port are paid before a bottomry bond, and a bottomry bond before a lien on a contract of affreightment. Maritime liens are usually preferred on the score of merit and necessity, for the advancement and protection of commerce. Salvors are first paid out of the property saved.

Decree for libellants.

For a full citation of authorities on the question of lien on domestic vessel, examine *The Celestine*, Volume 1 of this Series, page 1; *The Lady Franklin*, Id. 557; *The Eclipse*, ante, 99.

For a full discussion of Admiralty Rule xii, with special reference to the amendment of May 6th, 1872, consult 7 American Law Review, 1; also opinion of DEADY, J., in *The Augusta*, reported in 5 American Law Times Reports, 495, and opinion of BLATCHFORD, J., in *Wickes vs. The Circassian*, Id., 483. [*Reporter*.

MARSH vs. NORTHWESTERN NATIONAL INSURANCE COMPANY.

DISTRICT COURT — EASTERN DISTRICT OF WISCONSIN — OCTOBER TERM, 1872.

IN ADMIRALTY.

1. An insurance company is liable to the legal holder of a policy, though the person who procured it had, by mistake, ordered it cancelled.

2. The fact that the premium had not been actually paid is no defense against a *bona fide* holder. Mutual accounts have, in such case, the effect of payment.

3. A man who buys and ships for a firm in another city, whose funds are used, the profits or loss to be divided, and each shipment to be a distinct venture, is not a partner, and the firm can sustain a libel on a policy indorsed to them, without prejudice from his orders or mistakes.

This was a libel *in personam* on a policy of insurance.

The libellants, Marsh & Sternberg, partners in trade in the city of Buffalo, made an agreement with William B. Hibbard, of Milwaukee, to purchase wheat for them at Milwaukee and ship it to Buffalo, libellants to pay for each cargo, and if there should be a profit on a cargo Hibbard was to have half the profit, and if there were a loss on a cargo he was to pay half the loss. Libellants were to transact the business in Buffalo, and Hibbard in Milwaukee. Under this arrangement Hibbard, with three persons associated with him, purchased and shipped several cargoes, each purchase and shipment being a distinct venture.

Wheat was purchased by Hibbard and his associates with funds advanced by the Wisconsin Marine and Fire Insurance Company Bank, of which David Ferguson was cashier, and shipped on board the schooner Excelsior, in the name of D. Ferguson as shipper, for Marsh & Sternberg, Buffalo. A cer-

States, 5 Peters, 552, 561; Smith's Mercantile Law, 66, 72, 73; Willard's Equity, 190, 191.

Each partner is the agent of the other, and can make any lawful contract in relation to the business of the firm. *Reid vs. McNaughton*, 15 Barbour, 177; *Tapley vs. Butterfield*, 1 Metcalf, 515; *Locke vs. Stearns*, Id., 560.

When Hibbard purchased the wheat it was the property of all the parties interested. When he borrowed the money to pay for it, and pledged the wheat as security, it still remained the property of the parties jointly interested, subject to the lien upon it as security for the payment of the money loaned, and when that money was paid by Marsh & Sternberg it was paid for the partners, who still owned the wheat subject to a proper accounting as between themselves.

The policy of insurance was effected for joint benefit. It is of no consequence that it was in Hibbard's own name. The court would compel its application for the benefit of those interested.

The policy was cancelled by mutual agreement in good faith on both sides, and after the premiums had been partially earned, and before a loss had occurred, and both parties were bound by it.

It is claimed that Hibbard only acted as the agent of the libellants in relation to the cancellation of the policy, and exceeded his instructions in that regard; still his act was binding on the libellants.

An agent acting within the general scope of his authority binds his principal, notwithstanding he may have departed from his instructions, provided the party with whom he contracts had no knowledge of the instructions. Flanders on Insurance, 157; *Perkins vs. Washington Insurance Company*, 4 Cowen 645; *Central Insurance Company vs. National Protection Insurance Company*, 20 Barbour, 468; *Lightbody vs. North American Insurance Company*, 23 Wendell, 18.

Hibbard was then agent for transacting the general business of purchasing, shipping and insuring here. If he misunder-

stood the purport of the telegram of the 11th October, and in cancelling the insurance in question acted according to his then understanding of it, but in excess of his instructions, under the authorities cited above the libellants are bound by his act.

Even if he stood in the position of an agent, the loss should fall upon his principals, and not upon the insurance company, the officers of which had no knowledge of what his instructions were. The telegram was not sent to the insurance office at the time of the order to cancel. It was never seen by any officer of the company until after the loss.

There is nothing in the claim of the libellants that they are assignees of the insurance to take this case out of the general rule.

They are a part of the original parties to the transaction, and when they paid the draft drawn by Hibbard the transaction was remitted to precisely the position it would have occupied if they had forwarded the money to Hibbard before the purchase and there had been no transfer of the insurance. Besides, no notice was given to the insurance company of the assignment of the certificate of insurance to the libellants, and the doctrine stated in 2 Duer's Marine Insurance, 51, 52, and note, and 59 and 60, has no application to the case under consideration.

The libellants were not assignees of the insurance for their sole benefit. They were assignees, if at all, for the parties jointly interested — for the *partners*.

Miller, J.: Under the agreement between Marsh & Sternberg, the libellants, and William B. Hibbard, he purchased several cargoes of wheat in Milwaukee, and shipped them for Marsh & Sternberg to Buffalo. This business continued through a portion of the season of 1871. The associates of Hibbard were not known to or recognized by Marsh & Sternberg as partners. Hibbard associated these persons with him on his own account, without regard to Marsh & Sternberg. These persons were in no sense the partners of Marsh & Sternberg,

nor do they in any manner change the original relations between the parties. Hibbard may have an account to settle with his associates, but Marsh & Sternberg have no connection with them, as partners or otherwise.

The purchase and shipment of each cargo was a distinct and separate venture. By the arrangement the parties mutually granted to each other a legal remedy. Hibbard acquired a legal right to prosecute an action at law against Marsh & Sternberg for his share of the profits on the respective cargoes, and they had a right of action against him for their share of each loss. Hibbard did not acquire an interest as a partner with Marsh & Sternberg in any of the cargoes. A bill in equity would not lie between these parties for an account of profit and loss, as each party had a complete remedy at law, and Hibbard had no share or interest in the wheat. His interest in the business was provided for by way of compensation, and nothing more. Independently of the agreement, one venture or transaction would not make the parties technical partners, requiring a bill in equity for adjusting their accounts.[1]

There are decisions to the contrary, but courts are inclined to relieve parties of the complication of proceedings in equity in this respect as far as possible. But speculation is unnecessary, as the agreement between the parties fixes their respective rights. The objection in the answer in regard to the alleged partnership raises a question of remedy and not of right; and in this case there cannot be necessity of a settlement between the libellants and Hibbard for either a profit or loss, as the cargo became a total loss by the vessel foundering before reaching her port of destination.

The dispatch of Marsh & Sternberg to Hibbard, on which

[1] *Musier vs. Trumpbour*, 5 Wendell, 274; *Brubaker vs. Robinson*, 3 Pennsylvania Reports, 295; *Gillis vs. McKinney*, 6 Watts & Sergeant, 78; *Coles vs. Coles*, 15 Johnson, 159; *Brighton vs. Eveleth*, 9 Massachusetts, 538; *Galbreath vs. Moore*, 2 Watts, 86; *Borrell vs. Borrell*, 9 Casey, 492; *Van Amringe vs. Ellmaker*, 4 Barr, 281.

he ordered the risk cancelled, was dated October 11th. On that day Ferguson, in trust for the bank, held the legal title to the cargo and the beneficial interest under the insurance. On that day no person could control the insurance but himself, and neither Marsh & Sternberg nor Hibbard, nor the respondent could disturb his interest in the insurance without his consent. Any act of theirs jointly or severally in this regard, would be void as to him.

On the morning of the 12th October Marsh & Sternberg, having honored the draft, became the legal owners of the cargo by indorsement of Ferguson of the bill of lading, and the assignees of the certificate of insurance, entitled to be paid the loss, if any, on return of the certificate. They acquired the same rights as Ferguson in the insurance. The right of Ferguson or his assigns to the loss became vested in Marsh & Sternberg, who have the same power as he had to maintain this libel.

William B. Hibbard had no authority from any source to cancel, or give notice of cancellation, of the policy of insurance while it was in the hands of a *bona fide* holder entitled to the payment of the loss, if any.

At the time he gave the notice to respondent the certificate of insurance had passed to Marsh & Sternberg. He gave the notice without their knowledge or consent; and for this reason the cancellation, if made, was void as to Marsh & Sternberg, and it was also void as to them on the ground of mistake on the part of Hibbard. It cannot be claimed that this mistake prejudiced the respondent, as the loss was total, and the company could not have prevented it. If the loss had been partial, possibly the company might, by the notice of cancellation, have been induced not to investigate the loss. By the terms of the insurance contract, in case of loss, the money was payable to Ferguson or order on return of the certificate. The company demanded the certificate, which was not returned, but was in the hands of Marsh & Sternberg. It also demanded a portion of the premium, which was not adjusted nor paid. A

mere memorandum of cancellation was made on the books. It is questionable whether the liability of the company did not continue, even in the absence of the mistake, until the certificate was returned and cancelled and the rate of premium fixed.

To hold the contract of insurance rescinded under these circumstances would sanction a very loose manner of business where the utmost strictness is called for. At all events the error of Hibbard was corrected by notice to the company, and the original rights and liabilities of the parties were not disturbed or changed. The company has not been released from its obligation to pay the amount of the insurance.

The objection that the premium had not been paid cannot avail the respondent. The company and Hibbard's insurance agency mutually credited each other, and at the end of every month they struck a balance of their accounts. This was a payment in effect; and at all events the certificate that W. B. Hibbard is insured implies a receipt of the premium, which is binding in the hands of third persons and innocent holders of the certificate. The legal presumption was that the premium had been paid.

Decree for libellants.

That the fact that the premium had not been actually paid is not a good defense to an action on the policy, consult *Baptist Church vs. Brooklyn Fire Insurance Co.*, 28 New York, 153; *Post vs. Ætna Insurance Co.*, 43 Barbour, 351; *Boehen vs. Williamsburgh Insurance Co.*, 35 New York, 131; *Pino vs. Merchants' Mutual Insurance Co.*, 19 Louisiana Annual R., 214; *DeGaminde vs. Pigou*, 4 Taunton, 246.

The cancellation of a policy must be the act of the principals; a broker or agent, even though the policy may have been left in his hands, has no right to demand or consent to the cancellation. *Xenos vs. Wickham*, 33 Law Journal, (C. P.) 13. [*Reporter.*

In re WRIGHT.

DISTRICT COURT—EASTERN DISTRICT OF WISCONSIN—OCTOBER TERM, 1872.

IN BANKRUPTCY.

1. An insolvent merchant, having sold his homestead for cash, cannot, by moving his family into his store, hold that as his homestead, exempt.
2. Though his right to sell his homestead is undoubted, he cannot shift it, to the prejudice of his creditors.
3. In such case the Court will order a delivery of possession to the assignee.

George C. Wright had for several years been the owner and occupant of a comfortable house and lot in Fond du Lac, occupying said premises with his family until about two weeks before proceedings in bankruptcy were commenced against him. He had been doing a small business as a boot and shoe dealer and manufacturer, and a short time before being put into bankruptcy he purchased, on credit, an unusually large amount of goods. The notes for said purchases about becoming payable, he sold his homestead and removed his family into his store. This was a two story building, constructed solely for business purposes, and occupied by him exclusively as his store and shop. Adjoining this building was a one-story frame structure, which had been under rental for some considerable time. Wright, about the time of removing his family into the store, removed the addition, for the reason, as he alleged, that the foundation wall rested on the adjacent lot, and the owner demanded the occupancy of his ground to the division line. About the same time he put up a temporary partition of boards, placed on end, and not extending to the ceiling, thereby dividing his store from the apartments occupied by his family.

Wright having been adjudged a bankrupt on creditors petition, his assignee filed this petition for a surrender of this property, Wright claiming it as exempt under the homestead exemption clause.

Jenkins & Elliot, for assignee.

Finches, Lynde & Miller, for bankrupt.

MILLER, J.: Wright, with full knowledge that his notes were maturing, sold his homestead, removed his family of six persons into one side of his store, and removed the one-story addition then drawing rent, within three weeks of his bankruptcy, and after he had greatly reduced his stock, without appropriating the proceeds of sales towards the payment of his debts. The homestead and the store property were unincumbered. He sold the homestead for cash, less a debt of about $250 he owed the purchaser. And he mortgaged another lot to secure a debt of $900, thereby giving that creditor preference over his other creditors.

I have no doubt that George C. Wright committed a fraud on his creditors and also on the bankrupt act. He was doing business in a building constructed solely for business purposes, and not having the appearance of a dwelling, with an adjoining building under rent, open to the view of his creditors when he was purchasing their goods on credit, and occupying at the same time with his family a comfortable homestead, and at the time his notes for an unusually large increase of stock were maturing, within three days he made all these changes as to his property. His creditors no doubt gave him credit on the faith of his unincumbered lot on which his store was built, and also of his other property and his stock of goods. They had a right to be paid, if necessary, out of that property.

The adjoining structure might have been reduced in size. The removing of this building has the appearance of a plan to bring the lot and premises within the homestead exemption. I do not believe that Wright now occupies the premises as his

homestead with due faith to his creditors. His whole operation has the appearance of a scheme to defraud creditors by forcing a compromise from them. His answer to the petition removes all doubt on this subject. He admits that he was embarrassed in his circumstances, and was unable to pay his debts as they became due, and he hoped to be able, by the change he made in his property, to make some arrangements with his creditors which would enable him to continue his business. He did sell his homestead for cash, and he did greatly reduce his stock within a short time without paying his creditors. He delivered to the assignee about $800, which is a small sum compared with the amount of his sales. He committed a fraud on the bankrupt act by mortgaging a lot to secure an old debt, when he knew he was insolvent. The bankrupt act prohibits preferences to creditors. It is said that the homestead had been in market through a land agent for some time, but that is not material in this issue. He had a lawful right to sell his homestead, but that did not give him the right to shift his homestead, under the circumstances, to the prejudice of his creditors and in violation of principles of fair dealing.

An order will be made that George C. Wright, the bankrupt, convey to the assignee the said premises, and surrender possession to the assignee.

RAFFERTY vs. MALLORY.

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — OCTOBER, 1872.

IN EQUITY.

1. An administrator who has bid in in his own name property on the foreclosure of a mortgage belonging to his intestate, holds the same for the benefit of the heirs, and cannot sell the same without authority of the court.

2. An owner of land is bound by all recitals in his chain of title, and where in a deed made by such administrator he conveys in that capacity, a purchaser receives the title with full knowledge of the trust.

3. Such purchaser acquires no title, and the heirs at law can recover the property.

This was an action by Harriet M. Rafferty and others, heirs at law of William R. Oliver, to recover lands bid in, in satisfaction of a mortgage due the intestate, by a foreign administrator, and sold by him to Isaac M. Mallory, the defendant, without any order or authority of the probate court.

John Milton Oliver, for complainant.

The general rule is that an administrator is not suable and cannot sue outside the jurisdiction appointing him. Story on Conflict of Laws, § 513.

This rule does not exempt the foreign administrator from liability, *as administrator in fact* or *de son tort*. He is liable, and is estopped denying his receiving the goods *as administrator*. Story on Conflict of Laws, § 514; *Campbell vs. Tousey*, 7 Cowen, 64; *Parsons vs. Lyman*, 20 New York, 112; *Marcy vs. Marcy*, 32 Connecticut, 317; *Suroringen's Executors vs. Pendleton's Executors*, 4 Sergeant & Rawle, 389; *Bryan vs. McGhee*, 2 Washington, Circuit Court, 337; *Baker*

vs. Smith, 3 Metcalf (Kentucky), 264; *Wilkins vs. Ellett*, 9 Wallace, 740.

Independent of any statute therefore, as the administrator sued, here describing himself as administrator, he could take only in such character, and was bound to act for the estate, and that only; this would be true, whether he described himself as administrator or not, and the absence of his name of office would have no effect except as to third parties.

Independent of any statute he might purchase land, on a debt, for the estate, and his purchase, *in his own name*, would not bar either himself or the estate, from the allegation of the fact.

By the Illinois statute (1 Gross Statutes, p. 385, § 50) an administrator is directed to bid in lands, if necessary to save a debt, which shall be assets in his hands, and may be again sold by the order of court, and distributed as personalty; and by Revised Statutes, 1845, p. 596, § 1, *a foreign administrator* is enabled to prosecute suits in the same manner as if administration was granted in this state.

The effect of this statute is to create *ancillary administration* by the filing of letters from a foreign state. The *right* and *character* of the administrator is as fully established thereby as by the taking out of *new letters*. 36 Illinois, 406.

The above statute binds the administrator and his vendees in this case. He filed his letters in compliance with the statute and foreclosed under it.

The foreign administrator, by the statute and compliance therewith, standing *as administrator* in the courts of Illinois, taking property in satisfaction of a debt due the decedent, holds the property so taken in trust for the estate — *i. e.*, the creditors, or, if none, the heirs, who are entitled to recover the same in equity. *Lewis vs. Lyons*, 13 Illinois, 120; *Wingate vs. Pool*, 25 do., 121; *Fifield vs. Sperry*, 20 New Hampshire, 338; *Gibson vs. Bailey*, 9 do., 172; *Thurston vs. Kennett*, 22 do., 160; *Webber vs. Webber*, 6 Maine, 127; *Johnson vs. Bartlett*, 17 Pickering, 477.

The administrator cannot purchase for himself at any sale wherein the estate (or he as administrator) is interested. This applies to judicial sales by the officers of court as well as sales by the administrator in person. *Thorp vs. McCullum*, 1 Gilman, 614; *Price vs. Morris*, 5 McLean, 4; *Millenburg vs. Murphy*, 36 Illinois, 344; *Martin vs. Wyncoop*, 12 Indiana, 266; *Bank vs. Torry*, 7 Hill, 260; *Michoud vs. Girod*, 4 Howard, 503; *Schoonmacher vs. Van Wyck*, 31 Barbour, 458.

So an administrator purchasing at a sheriff's sale on a judgment against the decedent takes a trust estate. *Darcus vs. Crump*, 6 B. Monroe, 363; 7 Barr, 48; *Shelton vs. Homer*, 5 Metcalfe, 462.

A purchaser is bound to notice all that appears in the chain of title, and if anything therein warns him he buys at his peril. 2 Leading Cases in Equity, 169; *Morris vs. Hoyle*, 37 Illinois, 155; 17 Pickering, 477, *supra*.

A claimant through a title by judicial sale is bound to show a judgment, levy and sale. This is in, and an essential part of, the chain of title of which the purchaser is bound to take notice; and so of title by decree. (Hence defendant was bound to look at the judgment or decree and sale, whereby he was fully advised, and not merely put on inquiry, of the representative character of the administrator, and of the mere exchange of the debt for the land, and so still assets in another form. The record of the mortgage was also notice to him.) *Wheaton vs. Sexton*, 4 Wheaton, 503; *Haiman vs. Pope*, 1 Gilman, 131; *Lessees of State vs. MacAlaster*, 9 Ohio, 19; *Jennings vs. Stafford*, 1 Ired, 404; *Seechrist vs. Burton*, 7 Watts & Sergeant, 403; *Blue vs. Blue*, 38 Illinois, 9; 1 McCord, 252.

We have seen that the administrator had no power or right to purchase for himself, and could only take as trustee, *and of this rule of law the defendant was bound to take notice*; and,

2d, That the record advised the defendant of the representative character of the administrator, whereof he was bound to take notice. It is also true,

3d, A purchaser is bound to know that representatives pursue their powers in the mode pointed out by statute. Perry on Trusts, § 225; *Reeder vs. Burr*, 4 Ohio, 458; *Matoon vs. Clapp*, 8 do., 248; *Bonner vs. Ware*, 10 do., 465; *Bell vs. Duncan*, 11 do., 192.

Hence lands can only be sold by the law *rei sitæ*. *Goodwin vs. Jones*, 3 Massachusetts, 518; *Bragg vs. Massie*, 38 Alabama, 89; *Ventriss vs. Smith*, 10 Peters, 160; *Gaines vs. De la Croix*, 6 Wallace, 720.

The fact that the real estate thus taken for a debt is to be treated as personalty *in distribution*, and is in a sense in the possession of the administrator and subject more to his control than that of which the decedent died seized, does not give him any personal title to it. *Kline vs. Moulton*, 11 Michigan, 370; *Meeks vs. Hahn*, 20 California, 620.

The deed from Lynn recites that it is *as administrator* he conveys, and this is *conclusive* notice to the purchaser. *Wormley vs. Wormley*, 8 Wheaton, 421.

The actual knowledge of defendant's attorney, *through whom he negotiated the purchase*, bound him. Knowledge by the attorney of the purchaser of the trust estate *is actual notice to the buyer*, unless presumptively forgotten by the attorney by lapse of time. *Hart vs. F. & M. Bank*, 33 Vermont, 270; *Fuller vs. Bennett*, 2 Hare, 394; *Varnum vs. Milford*, 4 McLean, 93; *Abell vs. Howe et al.*, 43 Vermont, 403; *Williams vs. Tatnall*, 29 Illinois, 553; *Tunstall vs. Trappes*, 3 Simons, 307; *Dunlop vs. Wilson*, 32 Illinois, 523.

The appellation as "administrator" in the foreclosure proceedings and deed was notice of the trust. *Shaw vs. Spencer* 100 Massachusetts, 389; *Krull vs. Krull*, 13 Allen, 407; *Williams vs. Fullerton*, 20 Vermont, 346; *Blaisdell vs. Stevens*, 16 do., 179.

He is a purchaser with notice if the deed made to him warns him by its recitals or references; and this though he has paid his money in full. *Wigg vs. Wigg*, 1 Atkyns, 384;

Cowan vs. Sims, 3 Metcalf, 391; *Halley vs. Oldham*, 5 B. Monroe, 237.

James L. Stark, for defendant.

BLODGETT, J.: The facts in this case, as set forth in the bill, and established by the evidence, are: That on the 29th of April, 1856, one D. B. Stiles, of Ogle county, Illinois, executed and delivered to one W. R. Oliver, of Washington, in the state of Pennsylvania, a mortgage on the west half of the south-west quarter of section 23, township 40, north of range 1 east, situate in said county of Ogle, to secure the payment to said Oliver of $575 in one year from said date; that in the fall of the year 1856 said Oliver died intestate, leaving several children as his heirs at law, of whom the complainant is now the only surviver and heir; that said complainant is now about twenty-one years old, and was under that age when this suit was brought; that, after the death of said Oliver, one William Linn was, by the orphans' court of Washington county, in the state of Pennsylvania, duly appointed administrator of the estate of said Oliver, and entered upon the performance of his duties as such administrator; that said Stiles made default in the payment of the indebtedness secured by said mortgage, and said Linn commenced a suit in chancery in the circuit court of Ogle county, in his name as such administrator, to foreclose said mortgage, in which suit such proceedings were had; that at the March term of said court for the year 1860, a decree of foreclosure was rendered in said suit, directing the sale of said mortgaged premises by the master in chancery of said court, to satisfy the amount secured by said mortgage, together with the costs of said suit, and on the 26th day of June, 1860, said master, in pursuance of said decree, offered said land for sale, and said William Linn bid the same off in his own name for the amount due on said decree, paying in cash only the amount due for costs, about $36; that at the expiration of fifteen months from said sale, said land not

having been redeemed, a deed thereof was duly executed by said master in chancery to said Linn, bearing date on the 7th day of June, 1864, said deed containing a recital of the substance of said decree and the purchase of said land by the complainant in said foreclosure suit; that on the 20th day of January, 1865, said Linn, without any order or authority of the county court of Ogle county, or of any court, sold said land to the defendant, Mallory, for the sum of $1,600 cash, and conveyed the same to him by deed of that date, in which he described himself as administrator of said William R. Oliver, said deed containing, among other things, the following recital: "Being the same land deeded to me as administrator of William R. Oliver, by Joseph Sears, special master." It also appears that said Linn filed as exhibits in said foreclosure suit copies of the letters of administration granted to him by the orphans' court of Washington county, in the state of Pennsylvania, and that the same were made part of the evidence and record in said case. The master's report of the sale of said land under the foreclosure decree stated that the only money paid by Linn on his purchase at the master's sale was the $36.18 costs. Linn has never paid the proceeds of the sale to Mallory to the heirs of Oliver, although said estate does not seem to have been in debt to any considerable amount; but in an account filed in said orphans' court, in 1868, Linn gave the estate credit for draft from Ten Eyck for proceeds of a "lot of ground in Lane, Illinois, and eighty acres of land, $945.95."

There is no direct proof in the case showing that this item refers to this parcel of land; but, from the fact that A. Ten Eyck is the name of the solicitor who attended the foreclosure suit for Linn, and that Ten Eyck lived in the town of Lane, Ogle county, it is probable that this item of the account refers to the land in question; but he never paid the money over to the orphans' court, or otherwise accounted for it than as above. He did not apply it in payment of debts for the estate, nor did he pay it to the estate. Linn is now insolvent. The bill prays that she be declared the sole beneficial owner of said land; that

the deed from Linn to Mallory be set aside, or that he be declared to hold in trust for complainant, and for general relief. There is no evidence in the case showing that Mallory had any notice of the trust with which this land was charged in Linn's hands than what is afforded by the record of the foreclosure suit and the deed he received from Linn, and the only question presented is whether there is enough in this record to charge Mallory with notice of the trust under which Linn held this deed. As between the heir or creditors of Oliver and Linn there can be no doubt of this trust. He bid the land off in his own name, at a judicial sale, for the purpose of collecting a debt due the estate of which he was administrator. He paid no money, but the title acquired by the bid stood in lieu of the debt he had theretofore held as administrator of Oliver. He acquired his title through a judicial proceeding in which he described himself as administrator, and spread upon the records of the court the letters of administration which gave him authority to act in the premises, and without which he could have taken no step in the case. The master who made the sale under the decree reported to the court that he sold the land to the complainant in the case, and that was not William Linn, but William Linn in his official character as administrator of Oliver, and the deed is made in pursuance and completion of such sale. All these facts are as it were ingrained into Linn's title, and form an essential part of it, and although the deed from the master does not describe him by his office, yet it recites all the essential steps in the proceeding, and shows conclusively that the complainant in the foreclosure suit, who was William Linn, administrator, etc., was the party of the second part in the deed. The records in this foreclosure case form public records. All persons are bound to take notice of them.[1] The law presumes the purchaser inspects the public records through which his title is derived before he accepts a

[1] 2 Leading Cases in Equity, 169; *Morris vs. Hoyle*, 37 Illinois, 155; *Johnson vs. Bartlett*, 17 Pickering, 477.

conveyance. No person could have inspected the chain of Linn's title to this land without learning that he paid no money for it, except a small amount of costs; that he bought it as administrator of W. R. Oliver, and held it as such when he made his deed to Mallory. All these facts were patent upon the record. But if these recitals in the chain of Linn's title were not enough, we find that when he comes to sell the lands he assumes and purports to act only in his character as administrator, and declares by his deed that the land he is selling is the same land he holds as administrator of W. R. Oliver, by virtue of the deed he has received from Joseph Sears, master in chancery. It is a familiar principle of law that every owner of land is bound by all recitals in his chain of title; and here, in the very act of passing the title to Mallory, Linn injects into it a notice to his grantee that he held it only by virtue of his office. This relieves the case of all doubt. Mallory must be held to have received the title to the land, with full knowledge of the trust with which they were charged, which is equivalent to saying that he knew Linn had no right to sell, and that his attempt to do so was inoperative and void. By the statutes of this state (Revised Statutes, 1845, chapter 57, section 50), an executor or administrator may purchase real estate at sheriff's sale to save a debt, but the property thus purchased becomes assets in his hands, and can only be sold by order of the probate court. In the condition of Linn's title, he had no right to sell this land except by order of the probate court of Ogle county, and all persons dealing with him are bound to take notice of Linn's disability to sell save as the probate court should authorize him. It is possible that if Linn had applied the proceeds of the sale to Mallory to the payment of the debts of the estate, or had even paid over to the heir, with notice, a court of equity would have protected him, although his conduct might have been illegal; the proceeds having been properly and honestly applied, a court of equity might have sanctioned the irregularity and quieted the title in the purchaser. But this is not the case we are contemplating. In the light of the proof in

this case, which shows that Linn has never paid this money either to the estate or its creditors, and has only credited the estate with a part of it, but has not paid over the money in accordance with his credit. When Linn offered to sell, Mallory, the purchaser, should have required him to first obtain an order from the probate court. Having neglected to do that, he must abide the consequences of his own negligence. The case is a hard one for Mallory, it is true, but his own negligence has occasioned it, and he must look to Linn for his redress.

Decree that defendant convey land to complainant within thirty days, or in default master in chancery convey.

REPUBLIC INSURANCE COMPANY vs. WILLIAMS.

CIRCUIT COURT—WESTERN DISTRICT OF WISCONSIN—NOVEMBER TERM, 1872.

1. THE ACT OF JUNE 1ST, 1872,—abrogated all rules of this court inconsistent with the state practice in common law cases, and required the United States Circuit and District Courts to conform to such practice in all cases where practicable.

2. No discretion is left except as to how near it is possible to follow the state practice.

3. UNIFORM SYSTEM OF PRACTICE WITH STATE COURTS.—Congress intended to remove the double system of practice, pleading and proceeding, and establish a uniform system which members of the bar could follow in either court.

4. GOVERNED BY STATE LAWS AND DECISIONS.—The regularity of proceedings should be decided by the state laws and the decisions of the state courts.

5. OPENING JUDGMENT BY DEFAULT.—In Wisconsin, to open a judg-

ment by default, a copy of the proposed answer, an affidavit excusing the default and an affidavit of merits, must, in all cases, be recorded.

This was a motion by defendant to set aside a judgment entered by default at the La Crosse term. The suit was commenced by the service of a summons in the form in use in the state courts in an action on contract for the recovery of money, which required the defendant to answer within twenty days after service. The complaint was not served, but was filed and sworn to in the form provided by the state statutes. The plaintiff's attorneys filed an affidavit of no answer, appearance, or demurrer, and entered judgment for the amount claimed in the summons, in conformity with the state practice.

Motion to set the judgment aside, and for leave to plead or demur.

Tenney, McClellan & Tenney, for plaintiff.

I. C. Sloan, for defendant.

HOPKINS, J.: Judging from the moving papers the defendant's attorney is not aware of or has not given proper effect to the change in the practice established by section 5 of the act entitled, "An act to further the administration of justice," approved June 1, 1872, which reads as follows: "That the practice, pleadings, forms and modes of proceeding in other than equity and admiralty cases in the circuit and district courts of the United States shall conform as near as may be to the practice, pleadings, forms and modes of proceeding existing at the time in like causes in the courts of record of the states within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." That abrogated all rules of this court inconsistent with the state practice in common law cases, and adopted the practice of the state courts, and required the United States circuit and district courts to conform to such practice in all cases where practicable. No discretion is left to the courts except upon the question as to how near it was possible to follow the state practice, for the

act certainly adopts it in all cases where it can be conformed to by the courts.

Congress obviously intended by the act to remove the double system of practice, pleading and proceeding existing in many of the states in common law cases, and to establish in each state a uniform practice with the state courts, so that the members of the bar would not have to proceed differently in the federal than in the state courts. It is a great relief to the profession in those states where the code practice exists, and under which most of the profession have been educated, to say nothing of the advantages of that system over the old. It is now sixteen years since the adoption of the code here, and a large majority of the lawyers have come to the bar under that practice, and are not familiar with the common law practice as it is has heretofore existed in this court, and they have consequently looked upon this court as a kind of foreign tribunal and have not availed themselves of its privileges.

Now, as this court has the power, and is required to conform to the existing state practice, it will do so as far as practicable. I shall endeavor to assimilate the practice as far as possible, and to that end shall give it a generous interpretation.

The summons is treated as the process, and by the act is required to be *tested*, so that it must be issued by the clerk in all cases. It may be served with or without a copy of the complaint, and if without, the defendant must proceed as in the state courts to obtain a copy of it, and the same delays will attach. Parties wishing to commence suit can send to the clerk a præcipe, or direction to issue summons, for relief or for the recovery of money on contract, stating the amount and claim for interest as they desire it to be stated in the summons. They may file complaint then or not, in their discretion, and the clerk will prepare the summons in that respect so as to meet the case.

I have felt it due to the profession to make these general remarks on the practice under the recent act of Congress, as this court has not published any rules since its enactment, and

parties may be misled, as the defendant in this case undoubtedly has been, by the printed rules distributed before its passage. In short, it is expected the practitioners in this court will adopt the practice and forms of proceeding used in the state courts in common law cases, and the regularity of the proceedings will be determined by the state laws, and the decisions of the state courts thereon.

This being an application to open judgment regularly entered by default, according to the state practice, it becomes necessary to examine and ascertain the requirements of the state courts to open a judgment entered under such circumstances. As I understand the practice, they require the defendant, in all cases, to prepare and serve a copy of the proposed answer, duly verified, an affidavit excusing the default and an affidavit of merits.[1] Although under the decision of the *Town of Omro vs. Ward*, 19 Wisconsin, 232, such affidavit may not be absolutely necessary, it would, however, be safe to always file one. The defendant not having complied with these requirements, this motion is denied; but as the practice is new and unsettled, it is denied without prejudice to renew on proper papers.

I have received numerous letters from attorneys enquiring as to the mode of proceeding in commencing suits, as to the form of pleadings, and as to verifying pleadings, and as to how to obtain copies of complaint when not served with summons, etc., the answer to which is obvious—consult and follow the state practice, which is all that is necessary to render proceedings regular, as it is by the act above quoted, adopted as the practice of this court.

From the moving papers it appears that the defendant's counsel intended to demur to the complaint. That presents a question that I do not find discussed or decided in the state courts, and it may not, and probably would not, arise

[1] *Mowry vs. Hill*, 11 Wisconsin, 232; *Burnham vs. Smith*, 11 Id., 258; *Johnson vs. Eldred*, 13 Id., 482.

there, as an appeal from the judgment might present the same question. But in this court writs of error do not lie from a judgment of less than two thousand dollars; so that a different practice on that question might be essential here to prevent a denial of justice. It is unnecessary, however, at this time, to dispose of that question.

Consult *Butler vs. Young*, United States Circuit Court, Western District of Ohio, opinion by SHERMAN, J., 5 Chicago Legal News, 146. [*Reporter.*

DANE vs. ILLINOIS MANUFACTURING COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—NOVEMBER, 1872.

IN EQUITY.

REMOVABLE GLOBE LANTERN—CHANGING POSITION OF PARTS.

1. To change the relative position of the parts of a mechanism is not patentable, where no different or additional function is performed.

2. Neither is such a change entitled to greater favor because one of the parts thus transposed is made to perform an additional function, if a similar device has been made before to serve the same purpose in the same situation.

3. A patent for removing from the bottom of a lantern certain devices by means of which it could be separated, and the globe taken out below, and placing them at the top so that the globe could be taken out above, cannot be sustained, although a disc ring which closes the opening between the parts is thereby made to reflect the light downward, such reflection having been well known.

4. It is no infringement to use those elements of a patented combination in which the patentee has no exclusive property, in combination with other elements, if different results are thereby obtained.

Dane vs. Illinois Mnfg. Co.

This was a bill in equity filed by James F. Dane, William Westlake and John P. Covert, to enjoin the alleged infringement of patents issued by the United States to William Westlake, for an improvement in lanterns, dated April 26, 1864, and re-issued to complainants as assignees of Westlake on the 23d of December, 1869, designated as re-issue No. 3747.

The facts and claims appear in the opinion.

West & Bond, for complainants.

L. L. Coburn, for defendant.

BLODGETT, J.: The nature and object of the invention as set forth by the patentee in his specifications, "consists in the construction of a lantern guard, without hooks, projections or catches sticking out or interfering with the safe and convenient use of the lantern, so that the same can be readily attached or detached in the employment of a band or disc to fill or cover the space between the enlarged band or ring at the upper end of the guard and the top of the globe, and in the application of suitable fastenings to secure the dome to the guard."

The upper ring of the guard is designated in the drawings and specifications by the letter *b*.

This upper ring of the guard is provided with a flange or ring on the inside, to receive the catches which fasten the ring to the upper part or dome of the lantern.

Extending outwardly from the lower edge of the band forming the dome, is a flange or disc *g*, which must be wide enough to fill the space between the dome and the top ring of the guard. Upon the under side of this disc *g* are fixed spring catches by which the guard ring is attached to the disc. The ring *b* must be large enough to allow the globe to pass through it in the act of removing the globe from the lantern, and the top of the globe must be held within the inner ring of the disc *g*, that is to say, it must enter far enough into the dome to be held securely in its place.

I have not followed literally the language of the specifications, but stated their substance, as I understand them.

The claims covered by the re-issued patent are—first, the removable guard made as described—but as this has been abandoned since the re-issue, and since this suit was commenced, no comment is necessary upon this part of the claim.

Second—The disc *g* in combination with the ring or band, *b* of the guard, and the fastening *e*, substantially as and for the purposes described; and,

Third—The guard *A*, in combination with the disc *g*, the fastening *e* and the removable globe *d*, substantially as specified.

The defendant by its answer denies the validity of the letters patent, for want of novelty, and also denies that the lanterns manufactured by it, infringe the complainants' patent.

Upon these issues several witnesses have been examined as experts by both parties, and a large number of exhibits and models, describing and illustrating prior inventions in the same line, have been put into the case.

I shall not take up time to analyze or pass on all the devices claimed by the defendant to have anticipated Westlake's invention, as many of them, at the most, contain only portions and suggestions of the now perfected mechanism. The leading object of Westlake and his associates, especially in their re-issued patent, was to secure to themselves the exclusive right to make and vend a lantern with a loose globe, removable through the top of the guard by means of the band or ring *b*, and the disc *g*, with the fastenings *e*.

Does the evidence in the case entitle them to the claims on which they still insist, that is the second and third claims?

On the 17th of July, 1855, one Charles Waters, as the evidence shows, received from the United States patent office a patent for an improvement in lanterns, the main feature of which was, as shown in his specifications and drawings, a loose, removable globe; but he removed his globe through the bot-

tom instead of the top of the guard. The mechanism by which he accomplished this result was a flange, or ring, extending outwardly from the lower edge of the top, or dome, of the lantern, into which the top of the guard rods was securely fastened, the lower ends of the guard rods were fastened into an annular ring or plate, large enough to allow the globe to pass freely through it. This lower guard ring was fastened by spring catches and lips to a flange projecting outwardly from the top of the base of the lantern, as is shown in the model.

It seems to me that we have in this device the idea of a removable globe fully worked out and applied, and it does not appear that any advantage is gained by taking the globe out through the top, instead of the bottom, of the guard, and the elements of the combination by which the same result is obtained, are the same in both lanterns. The parts of the Waters' lantern are transposed or changed by Westlake from the bottom to the top of the guard, and there perform the same, and no additional functions.

The band *D*, with its flange *C*, in Waters' combination is inverted by Westlake, and becomes the disc *g* in his combination, while the annular plate *c* of Waters' lantern is carried from the bottom to the top of the guard by Westlake, and there becomes Westlake's ring *b*. The spring catches are the same in both lanterns and fill the same office.

So, by simply inverting Waters' guard, you have exactly Westlake's combination, and you have only to fasten the springs in the bottom of the lantern to the inverted Waters' band *D*, and you have precisely Westlake's combination. They are built right up of the same parts — the Waters lantern complete—without changing the functions of a single part, or doing anything except to take the globe from the top instead of the bottom of the guard.

It is needless to cite authorities to show that the mere change of the location of the parts of a mechanism, so long as no different or additional function is performed, does not make

the mechanism patentable. Westlake cannot take Waters' mechanism, forming a loose globe lantern, and make it his own by simply re-locating the effective parts, so long as no different result is gained, and certainly there seems to me no substantial change in the results to take the globe out of the top instead of the bottom of a lantern guard.

The idea was to take the globe readily from the guard and lantern for the purpose of cleaning it, or replacing it if broken.

If Waters, by the specifications of his patent of July 17, 1855, had taught the whole world how to make a lantern from which the globe could be readily removed through the lower ring of the guard, with the whole mechanism made to operate together as appears to that end, he, in effect, had taught Westlake how to remove the globe from the top of the guard, because it required no invention to make the change. Waters taught everybody how the space between the enlarged ring *b*, as Westlake calls it, and the body of the lantern should be filled up by the disc *g*, and how the lantern should be put together in sections, as it were, and the place where the attachment should be accomplished, whether at the top or the bottom of the guard, was, after that, a mere matter of mechanical convenience, or artistic taste, in the construction of the lantern.

It appears to me there can be no doubt that Waters, in his lantern, has anticipated all that Westlake now claims in his patent—his re-issued patent.

It is true, as was suggested in the argument, that the disc *g* in Westlake's patent performs the double function of a reflector, as well as a means of attaching the guard to the dome; but a disc for a reflector in that place, as the proof shows, was old, and so I do not think the suggestion aids the complainants, as if it proves anything, it is that Westlake did not invent the disc, but only put the spring catches upon it wherewith to fasten the guard to the dome or disc.

I will only take time to allude to one other device, shown in the evidence as prior in point of time and foreshadowing, if

it did not accomplish, the same result as Westlake's, and that is Max Miller's patent, obtained August 17th, 1858.

This lantern has a loose globe, removable through the top guard ring, but the disc *g* or *c* does not appear in the combination; the same result is accomplished without the disc.

It is true it was urged that Miller's globe is a plain cylinder, and that his device would not allow the use of a globe shaped as Westlake's was; that is, bulging in the middle and contracted at the top. But he made his contraction by a cone above the globe, so as to accomplish the same result.

Finding, then, from the testimony, that Westlake's alleged invention had been successfully accomplished by the prior invention of Waters, it is hardly necessary to discuss the question of infringement.

I will, however, say that his disc, at the top of the globe, was old for the purpose of a reflector, and Waters having used a flange turned outwardly from the bottom of his dome band for the purpose of fastening his guard rods into it, it seems to me Irwin had a right to use it for for the purpose of hinging the top ring of the guard of his lantern thereto, thereby making a basket, in which the globe was securely held, and obtaining a result different from that accomplished by Westlake and without the use of any part of the combination to which Westlake had an exclusive right. Irwin's fastenings are not the same as Westlake's—one uses two spring catches, and the other a hinge and spring catch, whereby Irwin makes a basket of his guard in which the globe is safely held.

This bill must, therefore, stand dismissed with costs.

The suit of the same complainants against the Chicago Manufacturing Company on the same patent, and involving substantially the same facts, was heard at the same time and same order entered. [*Reporter.*

DANE vs. CHICAGO MANUFACTURING COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—NOVEMBER, 1872.

IN EQUITY.

"GERSTEN" LANTERN DEFLECTOR.

1. The date of an invention must be taken to be when the application was filed, if it does not appear when the model and drawings were made which show it to have been perfected, although the patentee had previously commenced experiments upon it.

2. Lamps have been well known with chimneys surrounding the flame, and thus promoting combustion, and with deflectors which closed the base of the chimney, and directed the air admitted through apertures upon the flame; and there can be no valid monopoly for enlarging the chimney, so as to form a globe and the deflector so as to close the increased aperture at its base, although the glass is thereby removed further from the flame and protected from the heat.

3. How far the globe shall be enlarged, and the chimney removed from the flame, is a question of judgment, and involves no invention.

Bill for an accounting and to restrain alleged infringement of the Gersten patent for "lantern deflector."

The bill of complainant sets forth that on the 25th of January, 1859, a patent was duly issued from the United States patent office to Conrad Gersten for an improvement in lanterns; that said Gersten afterwards duly assigned the said patent to the complainants, Dane & Westlake; that after receiving said assignment, said Dane & Westlake surrendered said letters patent, and made application for two new patents to be issued for the same invention, with corrected descriptions and specifications; and that on the 16th day of September, 1867, new letters patent, each for a distinct and separate part of the thing patented as aforesaid, and each for some material part of the

original invention, were duly issued to said Dane & Westlake, as assignees of said Gersten, one part of which re-issued letters patent was numbered 2,765, and that a legal, corrected description of that part of the original improvement contained in said re-issued patent 2,765, was given in the words of said Dane & Westlake, annexed to the said part of the said re-issued patent; that afterwards an equal, undivided interest in said re-issued letters patent was duly assigned by the said Dane & Westlake to the complainant, John P. Covert; that the defendant was making and vending lanterns containing substantially the improvement and invention described in, and secured to, the said complainant, by the said re-issued letters patent 2,765.

Defendant denied the validity of the said re-issued letters patent, and also any infringement thereof.

West & Bond, for complainants.

L. L. Coburn, for defendant.

BLODGETT, J.: The main point in regard to the validity of the patent is made upon the question of novelty; and on that question, the state of the art at the time, and before the time of Gersten's alleged invention, has been very fully discussed and examined by counsel.

The feature in the Gersten patent, of which the infringement is alleged, is the plate or deflector, *q*.

It appears from Gersten's specifications that the general scope and purpose of his invention was a lantern in which kerosene or carbon oils could be used for illuminating purposes.

To accomplish this he constructed a burner, the main features of which were, first, a cylindrical metallic ring or band, setting upon the top of the oil-cup, and divided into two compartments by a horizontal plate *m*, filling the entire ring. The lower apartment was termed a "cooling chamber," and was intended to prevent the heating of the oil in the oil cup.

Into this cooling chamber air was admitted by holes in the band and near the lower edge. Above the plate forming the top of the cooling chamber, the band was perforated with holes sufficient to admit air for the supply of the flame. In the top of the ring is set the deflector *q*, which, extending to the periphery of the ring forms what Gersten calls the flame chamber. The deflector *q*, is swelled up in a conical form, and in the center is a boss, which has a slot cut in it a little wider than the thickness of the wick to be used. A wick tube passes up from the oil cup in the center of the ring, through the cooling chamber into the flame chamber, and near enough through the boss in the deflector to secure a clear flame above the boss or apex of the deflector. The ring is perforated with holes for the admission of a small quantity of air above the deflector. Into the top of this ring immediately above the deflector, is set the glass shade or globe of the lantern, and to the top of the globe a suitable dome is affixed, of a form and mode of construction particularly described; but as that part cuts no figure in this controversy, I will not take time to describe it.

The cylindrical ring *p*, is surrounded by an outer case or jacket, leaving a space between the two, which is closed at the bottom and open at the top, and down the annular space between the outer jacket and the ring *p*, the air passes and is admitted into the cooling chamber, the flame chamber, and the globe, through the holes before described in the inner ring for that purpose. This outer ring or jacket was intended to protect the air in the flame chamber from disturbing outside currents, and secure a steady flame, while the function of the deflector *q* was to deflect or concentrate all the air that entered the flame chamber to the base of the flame within the boss. In this combination the globe of the lantern acts as a chimney to the burner, and at the same time protects the flame from external air.

The defendant's lantern, which complainants claim infringes their patent, is what is known to the public as the tubular lantern, the chief characteristics of which are a dome above

the top of the globe, into which the air, which is heated by the flame of the burner in the globe, rises, and from which it passes by tubes into a tight chamber above the oil cup, the top plate of which chamber extends to the base of the cone of the burner.

In some cases, perhaps, the cone has been made by swelling a portion of the cone in the top plate of the defendant's air chamber, in the same manner as Gersten's cone was made by the boss and slot.

There can be no doubt but what there is a striking external similarity—almost identity—between Gersten's deflector *q* and the top plate of defendant's flame or air chamber.

The deflector was a tight plate continued closely around and filling the band or flame chamber, and concentrating all the air which came within the plate into the cone.

If this case was to be determined by a comparison of the mere external appearance, the court would have little difficulty in finding a manifest infringement, but the defendant denies that Gersten was the inventor of the deflector *G*, as used in his, defendant's, lantern, and also denies that the top plate in the air chamber of the tubular lantern performs the same functions as the deflector *G* in Gersten's does, and the evidence on one or both of these issues determines the case.

It appears from the proofs that Gersten commenced his experiments in May, 1858, but just when he made the model and drawings showing the perfected arrangement, does not appear, save that, as appears from the testimony, he filed his petition for a patent with the model, drawings, and specifications in the patent office on the 5th of November, 1858, which, for the purpose of this case, must be presumed, under the proof, as the date of his invention.

For several years prior to the date of Gersten's experiment, carbon or petroleum oils had been brought into use for illuminating purposes, and many devices had been tried, some of which had been generally adopted, for the construction of burners for this class of oils.

The most important difference between these oils and the animal oils or fatty matters previously used for illuminating purposes, was the fact that the carbon oils contained no oxygen in their composition, while the animal oils contained eight or ten per cent. of oxygen.

For this or some other reason, the carbon oils required a much higher degree of heat to secure combustion than the animal oils, and this could only be obtained by an increased supply of air to the flame at or near its base, where the combustion must take place. This supply of air was generally obtained by the employment of a glass or metallic cone setting over the top of the wick tube, with a slot through which the flame could pass freely, and a glass chimney fitted closely around the base of the cone, so as to secure a strong draught of air under the cone and in contact with the flame, as it passed into or through the slot.

It was, however, found necessary that some air should be admitted also to the chimney above the cone, and provision was usually made for that purpose by perforation of the band or burner above the cone.

The burner invented by M. A. Dietz, and referred to in the proof as "Exhibit Dietz," is perhaps the best illustration of the state of the art of constructing burners at the time Gersten began his experiments, although several other inventors, both English and American, had used cones a long time prior to Dietz.

Indeed the cone seems to have originated in a much earlier class of experiments having for their object a lamp or lantern for the burning of camphene, resin oil, oleic acid, etc., all which, like the coal oils, were highly carbonaceous, and required a copious supply of air to secure perfect combustion.

It is an indisputable fact that nearly all of the inventors who preceded Gersten whose devices are put in evidence in this case, called their cone or cap by which the supply of air is concentrated upon the base of the flame, a "deflector," so that it seems Gersten did not invent the name.

We have not time, however, to settle who invented the cone or deflector. It is sufficient to say that when Gersten entered the field, experience had demonstrated the necessity of the cone, the periphery of which must extend far enough to fill the chimney so as to induce a strong current of air through the cone and impinge it upon the flame in the slot; a small supply of air being also admitted into the chimney above the cone, to feed the flame after it passed into the chimney, and secure the combustion of the particles of soot which were drawn along with the flame into the chimney.

These burners secured a strong white light without smoking, and lamps with this device for burning kerosene or coal oil, had come into general use before Gersten's attempted invention, and Gersten's effort was to make a lantern in which kerosene could be used as it then was in lamps.

He prefaces his specifications by the statement that "the lanterns which have heretofore been made for burning coal oil will not admit of being moved through the atmosphere with any degree of velocity, or of being exposed to the wind without being extinguished, and that currents of air affect the flame so as to cause them to smoke to a very considerable extent." "The object of my invention," he says, "is to avoid the effects above enumerated, and others not necessary to enumerate."

He then proceeds to describe the mechanism by which he claims to accomplish the result aimed at, the substance of which I have already quoted.

It will be observed that Gersten does not claim to be the first inventor of kerosene lanterns, but says, in substance, that those in use could not be carried in the wind, and that they smoked.

It is manifest, on an inspection of Gersten's model, (which must be taken as illustrating his idea of the best method of applying his invention,) that Gersten took as the initial or starting point of his device, the Dietz burner then in common use, the inventor and manufacturer of which resided and carried on business in his immediate vicinity.

This [Indicating] is the Dietz burner, and it will be seen by those who have followed the specifications, that it contains everything of the Gersten burner or Gersten flame chamber, with the exception that it is not as much extended. Here is the cooling chamber, provided for the same as Gersten has; here is a cone, and here is the perforated ring for allowing the admission of air into the flame chamber. When this ring is placed upon the cooling chamber it makes a flame chamber precisely as Gersten did, except that it is not extended out as broadly. Here is also a provision for admitting air above the flame into the chimney.

We find in the Dietz burner all the elements of the Gersten cylindrical ring, or the band *p*, which surrounds and forms the external walls of the cooling chamber and a flame chamber as Gersten's is, and it is also perforated as Gersten's is, to admit air in the proper proportion into the cooling chamber, the flame chamber, and to the flame above the cone.

He wished to dispense with the chimney, or rather to make the globe perform the functions of a chimney, and to do so he had no alternative but to extend the cone outward to the base of the globe.

No experimenter or inventor had determined just how far outwardly the base of the cone should extend, but all had recognized the inexorable necessity of making the cone form a substantially tight bottom to the chimney, by which alone a draught through the cone could be obtained.

Gersten did this and nothing more, so far as the cone is concerned. His deflector performs the same function in the same way as the Dietz cone does. It required a mere mechanical alteration and not an invention to expand the base of the cone until it met and filled the walls of the globe at the base of the globe. Thus expanded, it was nothing but Dietz's cone, because it did nothing more. I say Dietz's cone, because Dietz used it in his combination—for he was not and did not pretend to be the inventor of the cone–it was old when Dietz took it up.

I said just now that no one had fixed the size of the cone,

and so it is true no one had determined any fixed size for the base of the chimney; but it was settled that to secure a good draught the chimney must be contracted at the top, and this Gersten accepted.

It was urged by counsel in the argument that the chimney would get heated and be liable to break on being exposed to cold currents of air or drops of rain, but this would depend upon how far the sides of the chimney were removed from the flame, and Gersten gives no rule for that, and other inventors had fixed no limit.

Indeed, I can but think that the counsel have shown more inventive genius in constructing this part of their argument than Gersten did in the combination of his deflectors.

A lantern is but a lamp so arranged as to be carried and protected from currents of air. The distinction is not a broad one. Lanterns and lamps both perform substantially the same functions in the same way. One is so arranged that it may be carried in the open air, and be protected against currents of air; the other is not thus protected. The distance at which a chimney should be removed from the flame in order that it may not be broken by currents of cold air in case of use as a lantern, must be determined by experience, and that alone—and it will be remarked that Gersten gives us no rules by which we are to determine that.

I find, then, in the deflector of Gersten, nothing more than the cone of the common hand lamp then in use.

Of the remainder of his device I have nothing to say, but it seems palpable to my mind that if he is to receive credit for inventing anything, it must be the device of screening the flame from external currents of air by the outer jacket, in combination with the other parts. His globe is but an enlarged chimney, the walls of which were far enough removed from the flame to be kept cool, and his deflector only an enlarged cone, which he was obliged to use in order to make this chimney draw.

It might be enough to stop here in the discussion of the

testimony, on the question of novelty, but the record shows that some months prior to his invention, one Max Miller, a resident of Brooklyn, had attempted the construction of a coal oil lantern in which he used the cone or deflector precisely like Gersten, except that he perforated with small holes his cone near the base of the boss, so that some of the air which came into the flame chamber escaped into the space above the cone, without going through the slot. He placed a deflector over the old cone of Dietz's, extending out to the wall of the lantern, making provision for the passage of a small portion of air between his deflector and the cone—this arrangement being necessary as he made no provision for admitting air into the globe in any other manner. Miller also used his globe as a chimney and removed it so far away from the flame that it would not get heated; and he also accepted the condition that he must, from the necessity of the case, put a substantially tight bottom into his chimney.

So that when Gersten claimed broadly a deflector extending to the walls of the lantern, he claimed too much, for Max Miller, his neighbor, had done that before him. If he could show that his cone was better than Miller's, by reason of leaving out the holes through which the air escaped into the chimney at the base of the cone, he might have had a patent on his improvement on the Miller deflector, but he did not ask for or obtain that. He claimed broadly in the re-issued patent the deflector as such, and it seems clear to me the testimony proves that Miller had, in all essential particulars, anticipated Gersten in the application of the cone to a lantern.

Arriving at this conclusion in regard to the question of novelty raised against the patent, I have not taken the time necessary to analyze and carefully consider the question of infringement, but will say that from some illustrations and experiments given at the trial, I think there may have been some force in the suggestion of defendant's counsel that the deflector *g* of Gersten's lantern performs a different function from what the top plate of the air chamber does in defendant's

lantern. It forms the bottom of the globe or chimney in the Gersten patent, and that, at least, does not seem to be the function of the plate in defendant's lantern.

Bill dismissed with costs.

DENNIS vs. CROSS.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—NOVEMBER, 1872.

IN EQUITY.

REMOVABLE GLOBE LANTERNS.

1. Waters' patent for a removable globe lantern construed and held invalid.

2. Spring catches having been used for fastening the oil pot in the bottom of lanterns, are old, and not patentable for the purpose of fastening the upper and lower parts of a lantern, which, being separated, allow the removal of the globe.

3. *It seems*, that although the claim described the use of catches and lips for fastening the two parts of the lantern, the inventor might use either alone.

This was a bill in equity, filed by Joseph S. Dennis, to restrain an alleged infringement by defendants of a certain patent issued by the United States to Charles Waters, of Brooklyn, New York, for an improvement in lanterns, on the 17th of July, 1855, and the title to which had become vested in complainant by *mesne* assignments.

L. L. Coburn, for complainant.

West & Bond, for defendants.

BLODGETT, J.: It appears from the pleadings and proofs that Charles Waters, claiming to have invented a useful improvement in the construction of lanterns, which consisted in the peculiar manner of securing the glass shade in the lantern, and also in the peculiar manner of securing the lamp to the lantern, applied to the patent office for letters patent thereon, describing in his specifications the manner of constructing and applying his invention substantially as follows:

"The top or dome of the lantern is of the usual form designated in the drawings by the letter *A*, from the lower edge of which a flange *a* projects outward, and into which the upper ends of the guard rods are firmly secured. The lower ends of the guard rods are secured in an annular plate *C*, which encompasses the lower part of the lantern.

"A metallic band or rim *D*, was then constructed, having a flange *C*, around its upper edge, which projects outward from the rim or band. The outer edge of the rim or band is bent or curved downward, so as to present a shoulder *d*, on the flange. To the under surface of the flange *c*, is attached a spring catch *e*, the end of which passes through the ledge or shoulder *d*. Opposite or diagonally opposite the spring catch two or more lips *f*, are permanently attached to the shoulder projecting outwardly, so as to pass over the annular plate *C*, when the parts are brought into juxtaposition."

The patentee also describes at length, as another part of his invention, his method of attaching the oil pot to the band *D*, but as this is not involved in the case under consideration it need not be recapitulated here. After thus describing his device the patentee proceeds to say:

"The above invention is extremely simple, and allows the ready adjustment of the base to the lantern and its ready detachment therefrom. No springs are required to be depressed by the hand in order to withdraw the lamp from the lantern or secure it therein, and the glass shade is firmly secured in the lantern without the aid of plaster or cement, thus enabling the shade to be detached with facility for purposes of cleaning."

"What I claim as new, and as my invention, and desire to secure by letters patent, is the application of the spring catch *E*, and lips *f*, substantially as and for the purposes set forth."

It will thus be seen that after carefully and elaborately describing the mechanical combination of parts whereby the

inventor constructs a loose globe, or removable globe lantern, and the method by which he attaches the upper and lower parts of his lantern together, the inventor contents himself by claiming as new, and asking a patent on the spring catch and lips, by which the band *D*, is secured to the annular plate *C*.

Probably no principle of patent law is better settled than that the patentee is limited by his claim. And the courts are only allowed to look at the detailed specifications, models, or drawings for the purpose of construing the *claim;* as, for instance, if any doubt existed as to the parts of the lantern to be attached together by the catch and lips, a reference to the preceding part of the instrument is allowable for the purpose of settling that point.[1]

"Although the inventor might have claimed something different from what he has claimed, the court must, in the construction of the patent, be governed entirely by the claim he makes."[2]

No patent is here asked or granted upon the top *A*, with the flange *a*, the annular plate *C*, the band *D*, with its flange *c*, and shoulder *d*, either singly or in combination; but the claim is solely for the spring catch *e*, and lips *f*, although the inventor reserves to himself the right to use one or more spring catches, and two or more lips. The only question in the case, then, is whether the proof makes out a case of infringement of this claim against the defendants. The defendants are engaged in the manufacture of lanterns, the top and guard of which are constructed substantially in the manner indicated by the specifications in Waters' patent, the wire ring at the bottom of defendant's guard being in all respects, to my mind, the equivalent of the annular plate *C*, in Waters' lantern, while the band *D*, with the flange *c*, and shoulder or ledge *d*, are all found in defendants' combination; but, as before remarked, neither of these parts, nor all of them in

[1] *Whipple vs. Baldwin Manufacturing Company*, 4 Fisher, 29.

[2] *Kidd vs. Spence*, 4 Fisher, 38.

combination, are covered by the Waters patent. The defendants connect the base of their lantern to the lower ring of the guard by two spring catches, instead of spring catches and lips in combination. And it is insisted by them that Waters limits his fastening to the combination of spring catches and lips, as shown or provided for in his specifications; but under the well established rule that courts should construe a patent liberally, and give the patentee the benefit of every fair intendment, I incline to the opinion that this patent would not be thus limited. So that, although he describes the use of *catches and lips*, yet he might use catches alone or lips alone if he was the inventor of the device. I do not, however, intend to be understood as expressing a confident opinion on this point, as it is not, in the view I take, decisive of the case. The evidence introduced shows abundantly, to my satisfaction, that spring catches, such as are used by defendants to connect the lower and upper parts of their lantern, are old devices for that purpose. They are found, as I think, in the application of H. & J. Sangster, made as early as November, 1851, to the United States patent office, and rejected for want of novelty; also in the letters patent granted to L. B. Carpenter, on the 25th of July, 1854, for an improvement in lamp fastenings.

It is true all these devices were for the purpose of fastening the oil pot or lamp to the rest of the lantern; but this is precisely what the defendants do. When Waters had connected his oil pot to his band *D*, by his springs *K*, *K*, as described, it was still nothing but an oil pot, and if those parts had been permanently fastened together in his lantern, as they are in some of the cheaper ones made by defendants, then the springs used by defendants perform precisely the same functions as the springs in Sangster's and Carpenter's devices. The spring catches are old, and the uses to which defendants apply them in their lantern are old, and although they perform the same function as the catch and lips in Waters' lantern, yet Waters not being the inventor of these springs, cannot cover them by his patent.

It is possible that the Waters catch and lips may, when used in combination with the flat annular band *C*, described by Waters, make a better fastening, and if that specific combination was used by defendants, and was covered by Waters' patent, they might be liable; but if, as complainant's witnesses testify, the defendants' two spring catches are the equivalents of Waters' catch and lips, then the catch and lips are but the two catches, and both are old.

For these reasons, which seem to me controlling and sufficient, the bill must be dismissed.

It is proper to add, by way of explanation, that the proofs show that Waters, in his original application, made his claim broadly for the combination by which the loose globe lantern described in his specifications was constructed, in the following language:

"Securing the glass shade *E*, in the lantern by means of the beads or projections *g*, *h*, on the upper and lower ends of the shade; said beads bearing against the lower edge of the top *A*, of the lantern and the upper edge of the rim or band *D*, which is secured to the annular plate *C*, by the spring catch *e*, and lips *f*, as herein shown and described. I also claim securing the base *H*, to which the lamp *I*, is attached to the lantern by means of the springs *K*, *K*, fitting over the head or projection *F*, on the inner side of the rim *D*, as described."

But the patent office rejected this claim, in which decision he acquiesced, and amended his claim by substituting the one now appearing upon the patent, and by that he must stand. If he was really the inventor of the loose globe lantern described in his specifications he might have appealed from the decision of the examiner who rejected his application, and probably his broad claim to the entire invention would have been allowed.

Bill dismissed.

VAN SCHAACK vs. NORTHERN TRANSPORTATION COMPANY.

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — DECEMBER TERM, 1872.

LIMITATION BY CARRIER OF COMMON LAW LIABILITY.

1. A common carrier may, by special contract, limit his common law liability in case of fire.
2. For this purpose it is sufficient that bills of lading containing such exemption be delivered to the agent or person bringing the goods, or placed in a box from which they were accustomed to obtain bills of lading for shipments from time to time made.
3. In such case the burden is upon the plaintiffs to show that they were not barred by the bill of lading.

On the 21st day of September, 1871, Donald Kennedy, the agent of the plaintiffs, shipped from Boston to Chicago, one hundred and sixty cases of drugs called "Medical Discovery." They were shipped by the Northern Transportation Company, defendant, and arrived in Chicago, the port of destination, where the plaintiffs resided and did business at that time, on the afternoon of Saturday, the 7th of October, 1871, by the steamer Milwaukee, belonging to the Northern Transportation Company.

The goods were landed and placed in the warehouse of the defendant, on the dock, shortly after the arrival of the steamer at the wharf, and there remained until Monday morning, the 9th of October, 1871, when they were consumed in the great fire in Chicago.

This was an action on the case against the defendant, as a common carrier.

Clarkson & Van Schaack, for plaintiffs.

Waite & Clarke, for defendant.

DRUMMOND, J.: I shall decide the case on the ground that there was a bill of lading which was a contract between the parties, exempting the defendant from loss by fire. There is considerable difficulty in relation to the question of notice, whether or not the plaintiffs had a reasonable time after the notice was given, if given, to remove the goods from their place of deposit after they were landed. It is not necessary to decide the case on that ground; but I think that the weight of evidence is that there was a contract between these parties, which constituted the measure of responsibility on the part of the carrier in relation to the transit of the goods.

When the courts say that it is competent for the carrier to relieve himself from his common law liability, and that it cannot be done by mere inference — that it must satisfactorily appear that the carrier has done so with the consent of the consignor—it is not meant that a court must ton consider testimony according to its legal effect and according to the fair inferences deducible from what appears in the case in relation to this question, namely: whether there was a contract between the parties by which the carrier was to be exempt from his common law liability.

In this case the testimony bearing upon this question of the bill of lading is contained in the deposition of Benjamin K. Little, who testifies as follows: "On the 21st day of September, 1871, one hundred and sixty boxes of merchandise called 'Kennedy's Medical Discovery,' were shipped by said company from Boston to Chicago, consigned to said Van Schaack, Stevenson & Reid. They were shipped by and at the request of Donald Kennedy, on application at the office of the company. At the time of said shipment duplicate bills of lading of said merchandise, under which said property was shipped, were made out. Said bills of lading were either delivered to said Kennedy or to his teamster who brought the goods at the time of the contract for shipment, or were at the time of said contract for shipment directed to D. Kennedy, and placed in a box in the office of said company, at No. 7 State street, as aforesaid, to

which box the said Kennedy and his said teamster had access, and from which, in all cases of shipment of goods, they were accustomed to obtain bills of lading when the same were not handed to them personally. Said Kennedy had for years very frequently shipped goods from Boston to the west by said Northern Transportation Company, through the office at which I was employed, as aforesaid, and had been accustomed to obtain the bills of lading as above stated. Said duplicate bills of lading were either made by me personally in the performance of my duty as such clerk, or by my assistant under my immediate supervision and examination. The making of bills of lading of the company and shipments of goods are my duty."

One of the plaintiffs was examined as a witness, and testified that no bill of lading was ever received by the plaintiffs; that after the goods were ordered, all they received was an invoice containing a memorandum that they had been shipped by the Northern Transportation Company; therefore it may be assumed that there is no evidence which, fairly considered, tends to establish that the plaintiffs themselves ever received this bill of lading.

Now this is the testimony in relation to the contract, which, it is alleged, was made between the parties as to the shipment and transit of these goods which were destroyed by fire; and the question is, looking at the testimony fairly, and drawing the inferences which can be justly drawn from the testimony, whether it is not a necessary conclusion that there was a contract made in relation to the transit of this property, and I think that there was.

Now there is often great difficulty, undoubtedly, in the application of this rule which allows a carrier to restrict his common law liability simply by making out a bill of lading and delivering it to the consignor or to his agent, and inferring thereby that the common carrier is exempt from liability; and while I am not prepared to say that the mere existence of such a state of facts would warrant the conclusion

that a contract was made by the consignor, still we are to look at what is established, and see what it was within the power of the party to prove—see if the inference is not fairly to be drawn from the testimony which is presented. Now, this witness annexed to his deposition a copy of the bill of lading, which contains a clause of exemption from the common law liability in case of loss by fire, and without saying that all the various conditions that were contained in this bill of lading necessarily bound the consignor, still it is fairly inferable, I think, that this defendant was in the habit of transporting property shipped by Mr. Kennedy on a bill of lading which contained this exemption, and that this bill of lading came into the possession of Mr. Kennedy, and was received and acquiesced in by him as the measure of responsibility on the part of the defendant in the transit of those goods—at any rate so far as the exemption from loss in case of accidental fire is concerned. The bills of lading were made out there. They were either given to Mr. Kennedy himself, to his teamster who delivered the goods, or were placed in a box where they were in the habit of placing bills of lading when they were not personally delivered to Mr. Kennedy, and where he was in the habit of receiving them, and for years he had been accustomed to ship goods to the west by this line.

Now, what is the necessary conclusion from this testimony in the absence of all countervailing testimony? It is that this bill of lading was delivered, and received by Mr. Kennedy with this exemption clause in it. This was on the 21st of September, 1871. The evidence shows that property was shipped under the precise form of this bill of lading that has been introduced, at least during that season. Now, is it not fairly inferable that Mr. Kennedy understood that the goods were to be shipped, the carrier being relieved from his common law liability in that respect? It is, as I think. If it were not so it was competent for the plaintiffs, and was their duty under the state of case which is made by this deposition, to rebut the inferences which necessarily grew out of the statement of facts

made by Mr. Little. They had no right, I think, to rest upon the doctrine that it was necessary for the defendant to rebut, or to prove that the contract was delivered to Mr. Kennedy.

Of course it is a hard case; but courts are full of hard cases and it is simply a question as to who shall bear this loss; and it seems to me, under all the circumstances of the case, that the plaintiffs must bear it, and not the defendant. The issue and judgment, therefore, will be for the defendant.

The liability cannot, however, be limited by merely showing a usage to give bills of lading containing certain exemptions. *Illinois Central Railroad Company vs. Smyser*, 38 Illinois, 355. Nor by mere notice, even though brought home to the shipper. *Nevins vs. The Bay State Steamboat Company*, 4 Bosworth, 225; *Rawson vs. Pennsylvania Railroad Company*, 2 Abbott's Practice (N. S.) 220; *Prentice vs. Decker*, 49 Barbour, 21; *Belger vs. Dinsmore*, 34 Howard's Practice, 421.

Where the contract excepted losses by fire, carrier held not liable for such loss. *Parsons vs. Monteath*, 13 Barbour, 353; *Dove vs. New Jersey Steam Transportation Company*, 4 Sandford, 136; *Mercantile Mutual Insurance Company vs. Chase*, 1 E. D. Smith, 115.

That a common carrier may limit his liabilities by contract, see *York Company vs. Illinois Central Railroad Company*, 3 Wallace, 107; *The May Queen*, Newberry, 464; *Seller vs. The Pacific*, 1 Oregon, 409; *Illinois Central Railroad Company vs. Morrison*, 19 Illinois, 136; *Western Transportation Company vs. Nexhall*, 24 Illinois, 466; *Bingham vs. Rogers*, 6 Watts & Sargeant, 495; *Lee vs. Marsh*, 43 Barbour, 102; *Price vs. Hartshorn*, 44 *Id.*, 655.

A person receiving a printed notice limiting the carrier's liability is chargeable with knowledge of its contents. *Hopkins vs. Westcott*, 6 Blatchford, 64.

And a receipt containing clauses of limitation is binding, if accepted with full knowledge of its contents. *Adams Express Company vs. Haynes*, 42 Illinois, 89. Simple delivery of such receipt not conclusive. *Illinois Central Railroad Company vs. Frankenberg*, 54 Illinois, 88; *Prentice vs. Decker*, 49 Barbour, 21.

The right of common carriers to restrict their common law liability has recently been elaborately reviewed by the U. S. Supreme Court, in *New York Central Railroad Co. vs. Lockwood*, October Term, 1873, reported in 6 Chicago Legal News, 77, and numerous authorities in both the state and federal courts are there cited and commented on. [*Reporter.*

TOOLEY vs. RAILWAY PASSENGER ASSURANCE COMPANY.

CIRCUIT COURT—SOUTHERN DISTRICT OF ILLINOIS—JANUARY TERM, 1873.

ACCIDENT INSURANCE.

1. POLICY EXTENDS TO ACCIDENTS WHILE GETTING OFF THE CARS.—Under a clause in an accident insurance policy limiting the liability to an accident received by the defendant "while actually traveling in a public conveyance provided by common carriers, and in compliance with all rules and regulations of such carriers," a recovery can be had for an accident happening while getting on or off the train.

2. INSURED ONLY BOUND TO KNOW GENERAL RULES.—Nor is the insured bound to examine the time card or ascertain all the *minutiæ* connected with the management of trains, but only such rules as a general traveler might be presumed, and ought to know.

3. If he attempts to get on a train after it has reached his destination, he does so at his own risk.

4. General rules of negligence stated.

This was an action by Daniel H. Tooley, administrator of the estate of John Tooley, deceased, against the Railway Passenger Assurance Company of Hartford, Connecticut, on two accident policies of insurance for $3,000 each, issued by the defendant to the deceased.

The facts are stated in the opinion.

Robinson, Patton & Lee, for plaintiff.

B. S. Edwards and *W. H. Brown*, for defendant.

DRUMMOND, J., charged the jury as follows:

John Tooley, on the 24th day of January, 1871, took from the agent of the defendant, at Quincy, Illinois, two policies of insurance, for $3,000 each. That amount was to be paid on

each policy in case of the death of Tooley within two days. It was provided that the liability should not exist unless while he was actually traveling in a public conveyance of common carriers, and in compliance with their rules and regulations, and besides he was not to neglect the use of due diligence for self-protection.

Tooley, on the afternoon of the 25th of January, took the Champaign accommodation train at Chicago and proceeded to Kankakee, where the train arrived shortly after seven o'clock.

It seems the practice was for the train to stop at the station and then pass on to the coal-bin, *provided* they took the entire train beyond Kankakee.

Accordingly, on this evening the train stopped at the station, and several persons left the cars, Tooley among others. The train remained at the station several minutes and took in water. The bell was then rung, the conductor signaled with his light, and the train went on to take in coal. There was a platform extending from the station house alongside of the railroad track towards the water-tank and coal-bin. When the train moved on, Tooley, who was standing by a door of the station house, started forward on the platform to overtake the train. When he reached the train, he extended his hands to grasp the car rails, and fell between the two passenger cars, and was run over and instantly killed.

The first question is, what was the measure of responsibility of the defendant under these policies of insurance? The language of the policies is: "Provided always that this insurance shall only extend to bodily injuries, fatal or non-fatal, as aforesaid, when accidentally received by the insured while actually traveling in a public conveyance provided by common carriers for the transporting of passengers in the United States or the dominion of Canada, and in compliance with all rules and regulations of such carriers; and not neglecting to use due diligence for self-protection."

These are the only conditions material to be considered in the examination of this case. Tooley must have actually been

a traveler in or upon the train; but it cannot be said that the responsibility ceased whenever he stepped out of the car to alight at a station, and that it never became operative again until his foot entered the car to resume his journey. That would be giving too narrow a meaning to the clause of the policy. We think that the fair construction of the liability assumed by the defendant in this respect was, that it included injuries received by Tooley while necessarily getting on or off the train, as a traveler upon it.

Secondly—It is a question of fact to be determined by the jury—was Tooley, at the time the injury was received by him, a traveler on the train? And this will depend upon the fact whether his journey terminated at Kankakee. It is claimed on the part of the defense that that was the termination of his journey, and, if so, then he was not a traveler on this train at the time of the accident.

I will call your attention to some of the facts having a bearing on this question. The conductor states in his evidence that when he took up the tickets of the passengers, Tooley's ticket was only for Kankakee. That is a fact proper to be considered by the jury in order to determine whether or not his journey extended beyond Kankakee—not conclusive, of course—because, as a matter of experience, we know that where men commence a journey, they do not always buy their ticket to the termination of the journey; and various circumstances may happen during the progress of a journey, to change the purpose of the traveler.

Mr. Merwin states in his evidence that in a conversation he had with Tooley he said that he intended or expected to go to Mattoon, which was south of Champaign, where the train stopped. Now, as qualifying this, perhaps, and to some extent inconsistent with it, is the testimony of the conductor. He says that just before they arrived at Kankakee he woke up Tooley and told him that the next station was Kankakee, and that Tooley made no remark intimating in any way that he intended to go further than Kankakee, and, therefore, that it

was not necessary for him to be disturbed. It is for you to say how much bearing this may have upon the question.

There is this other fact, that when the train started at Kankakee, Tooley attempted to get on it. That is claimed to be conclusive evidence of his purpose to proceed further. If his journey ceased at Kankakee, then it cannot be claimed, under the undisputed facts of this case, that the defendant would be liable, because, on the assumption that he was going no further than Kankakee, in attempting to get on the train as he did, it was at his own risk. If he were going beyond Kankakee on the train, then there are other considerations which may affect the question of negligence. According to the view which we take of the contract between the parties, if he were a passenger proceeding beyond Kankakee, on the train, he had the right to leave the car at Kankakee and return to it; he was not bound to remain *inside* the car all the time.

There is, perhaps, one circumstance which I ought to refer to in connection with the question of the determination of the journey at Kankakee, and it is this, that he did not purchase a ticket at Kankakee, and it is in evidence that the train stopped there several minutes; and if you believe the testimony on this point, he certainly had ample time to purchase one. Still that of course is not conclusive. He had the right, I suppose, under the practice and management of the train, to pay his fare on the cars. One of the conditions of these policies is, as has been stated, that Tooley should comply with all the rules and regulations of common carriers. We are not prepared to say that it was incumbent on him, under the circumstances of the case, to make himself acquainted with all the rules which might be contained upon the time card. We must give this clause of the policy a reasonable construction.

A policy is issued, we suppose, to any applicant. It is what is called an accident policy, and we are to infer that the meaning of this clause was that the traveler should only make himself acquainted with those general rules, as to the management of trains, and the conduct of railroads which are presumed to be

known to travelers under these circumstances. For instance, Tooley, as far as we know, was a stranger on this road. We cannot say that when he went on the train he was obliged because of this clause in the policy to examine the time card and ascertain all the *minutiæ* connected with the management and running of trains, but only such rules as a general traveler might be presumed, and ought to know. Any other construction than this would operate as a snare upon travelers. But, perhaps, if he did not know the time the train stopped at a particular place there might be a question whether it was not his duty to make some inquiries of the employes on the train. It is to be observed in deciding this question of negligence of Tooley, which is the last question to be considered, and to which I call the attention of the jury, that this is not an action between the representative of Tooley and the railroad, but between the representative of Tooley and the underwriter upon this clause in the policy, "not neglecting to use due diligence for self-protection." And perhaps there can be no better rule stated than that which was agreed upon by the counsel, namely, that it was his duty to use that degree of caution and diligence which a prudent man would use under the circumstances in which he was placed. We think, also, in determining this question of diligence on the part of Tooley, it is proper to take into consideration whether or not, when he alighted at Kankakee—which he had a right to do—any notice was given of the movement of the train.

If a person, having a right to leave a train at a station, is informed or notified in any way that the train is going to start, and an opportunity given to him to take his place again upon the train, and he chooses to remain until the train is put in motion and then is injured in getting on the train, it may be said that he is negligent—in other words, that he takes the risk of getting on the train while thus in motion. But if, having alighted at a station he has no notice by bell, whistle, or otherwise, of the movement of the train, or he has not the opportunity, after notice is given, to get on the train, and

intending to go further he attempts to get on the train and is injured, we think there is not the same measure of responsibility upon him. It would be natural for a man—for a prudent man—intending to go further on the train to make an effort, even when the train was in motion, to regain his place on the train.

Verdict for plaintiff.

This case was appealed to the Supreme Court, and is now pending there.

The company may be held liable for injuries sustained in alighting. *Keller vs. New York Central Railroad Company*, 24 Howard's Practice, 172; *Pennsylvania Railroad Company vs. Kilgore*, 32 Pennsylvania State, 292; *Pennsylvania Railroad Company vs. Zebe*, 33 Id., 318; S. C. 37 Id., 420; *Fuller vs. Naugatuck Railroad Company*, 21 Connecticut, 557.

Also for injuries in leaping from the train to avoid being carried by. *Davis vs. Chicago and Northwestern Railroad Company* 18 Wisconsin, 175; *Railroad Company vs. Aspell*, 23 Pennsylvania State, 147.

An accident happening to the assured while stepping from the carriage at his place of destination, is within the policy. *Theobold vs. Railway Passenger Assurance Co.*, 10 Exchequer, 44.

The company may be liable, though the assured fell between the cars when attempting to get on them while in motion. *Schneider vs. Provident Life Insurance Co.*, 24 Wisconsin, 28.

The New York Court of Appeals have recently decided that an accident policy insuring against personal injury "when caused by any accident while traveling by public or private conveyances provided for the transportation of passengers," covers an accident happening from falling upon a slippery sidewalk, while walking from the steamboat landing to the railway station, that being the usual route, and she so walking in the actual prosecution or her journey; and the fact that there were hacks at the landing by which she might have ridden, does not affect the question. *Northrup vs. Railway Passenger Assurance Company*, 43 New York, 516, reversing same case in the Supreme Court reported in 2 Lansing, 166.

[*Reporter.*

In re KINKEAD.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1873.

IN BANKRUPTCY.

MARRIED WOMEN AS BANKRUPTS.

1. COMMON LAW RULE RELAXED.—The common law rule that a married woman cannot enter into a co-partnership, or make any valid contract, has been much relaxed, and the rule in equity now seems to be that she may hold, control, and dispose of her separate property, incur liabilities on the strength of it, and that it may be subjected to the payment of her debts contracted in or about the management, improvement, or purchase of such property.

2. ILLINOIS RULE.—In Illinois, a married woman retains control of all the property, real or personal, which she had at the time of her marriage, or acquired thereafter from any person other than her husband, and may make contracts in regard to the same, which can be enforced either at law or in equity, to the same extent as if she were sole.

3. MAY ENGAGE IN TRADE.—She may also engage in trade with her husband's consent; and *it seems*, even without such consent, using her own property, and may bind herself by all contracts she makes in her business.

4. BE A PARTNER—EVEN WITH HUSBAND.—She may enter into a co-partnership, even with her husband.

5. CONTRIBUTE HER SHARE.—Where a man and his wife held themselves out to the world as partners in trade, it will be presumed, in the absence of proof, that she contributed her share of the capital, and that her time, skill, and earnings went into the business.

6. PARTNERSHIP CREDITORS FIRST PAID.—When, in such case, the firm become bankrupt, the partnership creditors are entitled to be paid out of the partnership assets in preference to an individual creditor of the husband.

7. MAY BE ADJUDGED BANKRUPT.—Such a partnership can be adjudged bankrupts, and *it seems*, the wife may also be individually adjudged bankrupt.

This was an application by Miles Manser, an individual creditor of Joseph D. Kinkead, to be paid a dividend on his

claims, amounting to $15,000, out of the assets of the firm of Kinkead & Co.

On the 7th of December, 1871, J. V. Farwell & Co., of Chicago, filed their petition in this court, setting forth that they were creditors of Joseph D. Kinkead and A. E. Kinkead, his wife, who were then doing business as co-partners under the firm name of Kinkead & Co., at Pontiac, Livingston county, in this district, and alleging that said firm of Kinkead & Co. had been guilty of certain acts of bankruptcy set forth in the petition. To this petition a general denial was filed, and the issue thus made was tried by the court on the 16th of February, 1872, resulting in finding said firm of Kinkead & Co., and the said J. D. Kinkead guilty of the acts of bankruptcy charged against them, and an adjudication of bankruptcy was entered in accordance with this finding.

No plea of coverture was interposed by Mrs. Kinkead, but inasmuch as it appeared from the petition, and also from other papers and proofs in the case, that she was a *feme covert*, no specific adjudication was entered against her.

J. D. Kinkead and his wife had been engaged in the mercantile business at Pontiac for several years immediately prior to the commencement of these proceedings in bankruptcy against them, and had both given their attention and skill to the business, but it did not appear how much each of them had contributed to the capital stock of the firm, nor, in fact, whether any capital other than their credit and labor was furnished by either.

At the time said firm was adjudicated bankrupt, they were indebted for goods furnished in the course of their trade as merchants to an amount exceeding $6,000, while the assets of the firm were about $4,000, and there appeared to be no assets of J. D. Kinkead individually.

On the 29th of May, an assignee was duly elected, and afterwards Manser, this applicant, appeared before the register and proved his debts against the said J. D. Kinkead, and at the second meeting of creditors he demanded to be paid a dividend

on his claims out of the co-partnership assets. To this the co-partnership creditors objected, and, at the request of the assignee, the register certified the question to the court for hearing and decision. These claims against J. D. Kinkead were contracted long prior to the formation of the co-partnership between himself and wife.

Jones, Hounshell & Lewis, for Manser, applicant.

Tenney, McClellan & Tenney, for assignee and general creditors.

The doctrine that a wife has no legal existence, and cannot hold property or make contracts, has been practically obsolete for ages.

The equity doctrine is that a wife can hold separate property, and therefore that she can control and dispose of it, and incur liabilities on the credit of it, and that it can be subjected to the payment of her debts.

Modern statutes have merely enacted this doctrine. Revised Statutes of Illinois, Chapter 69, § 2; Parsons on Partnership, 25–7.

The only controversy has been as to how the remedy should be administered; whether by a suit at law or in equity. The supreme court of Illinois holds that it must be in equity. *Carpenter vs. Mitchell*, 50 Illinois, 470; *Yale vs. Dederer*, 18 New York, 265; *Todd vs. Lee*, 15 Wisconsin, 365; *Todd vs. Lee*, 16 Wisconsin, 480; *Owen vs. Cawley*, 42 Barbour, 105.

Property bought by a wife, on her own credit, is her separate property, and her husband is not liable therefor, and has no interest therein. *Carpenter vs. Mitchell*, 50 Illinois, 470; *Carpenter vs. Mitchell*, 54 Illinois, 127; *Miller vs. Brown*, 47 Missouri, 504; *Kimm vs. Weippert*, 46 Missouri, 532; *Darby vs. Callaghan*, 16 New York, 21; *Knapp vs. Smith*, 27 New York, 277; *Ketchum vs. Walsworth*, 5 Wisconsin, 95.

Illinois statute construed. Husband may be agent of wife, and there ought to be an agreement between them as to his

compensation. Agency is the substance of partnership. *Emerson vs. Clayton*, 32 Illinois, 493; *Cole vs. Van Riper*, 44 do., 58; *Dean vs. Bailey*, 50 do., 481; *Dyer vs. Keefer*, 51 do., 525; *Wortman vs. Price*, 47 do., 22; *Lux vs. Hoff*, Id., 425; *Sweeney vs. Damron*, Id., 450.

The power of a wife to buy and sell, as if she were sole, necessarily implies the right to buy and sell on joint account with another. This is partnership. There is nothing to prevent her trading jointly with her husband. She can lend money to him and recover it, or borrow from him, or make other contracts, and make herself liable to the extent of her separate property.

Proceedings in bankruptcy are regarded as proceedings in equity, and governed by the same rules. They bring in all parties and interests, and make complete adjudication. *In re Schuyler*, 2 Bankrupt Register, 169; Bump on Bankruptcy, 302.

Section 11 of the bankrupt act has been held to include aliens, *femes covert*, and minors. Bump on Bankruptcy, 1; *In re Goodfellow*, 3 Bankrupt Register, 114; *In re O'Brien*, Bankrupt Register, Supplement, 38; *In re Book*, 3 McLean, 317; *In re Slichter*, 2 Bankrupt Register, 107; *In re Howland*, Id., 114. These statutes contain restrictions not in ours.

Blodgett, J.: It is contended on the part of Mr. Manser that Mrs. Kinkead, being a married woman, could not enter into a contract of copartnership with her husband, and that although the business at Pontiac was transacted in the name of Kinkead & Co., yet, as the pretended partnership was void and inoperative, by reason of the inability of Mrs. Kinkead to make a binding contract, the said J. D. Kinkead was in effect a sole trader, and the assets of the firm were in law the assets of said J. D. Kinkead.

The questions thus raised are important, not only in this case, but in many others which may arise touching the powers of married women to make binding contracts and the jurisdiction of a court of bankruptcy in the premises.

There is no doubt of the soundness of the proposition advanced by the claimants' attorneys, that at common law a married woman could not, as a general rule, enter into copartnership or make a valid contract of any kind.

But this rigid rule of the common law has been very much relaxed, both by the action of the courts of equity and by legislation on the subject.

The modern doctrine in equity now seems to be that a married woman may hold her separate property, can control and dispose of it, incur liabilities on the credit of it, and that it can be subjected to the payment of debts contracted in or about the management, improvement, or even purchase of such property. Thus far courts of equity seem to have gone without reference to statutes on the subject.[1]

By the act in relation to the rights of married women, adopted by the legislature of this state in 1861, full control is given to a married woman of all real and personal property owned by her at the time of her marriage, or which she acquired during coverture from any person other than her husband.

In the exposition of this statute, the supreme court of this state has, finally, in the late case of *Cookson vs. Toole*, 5 Chicago Legal News, 184, decided that a married woman can be sued at law on a contract made in relation to her separate property.

By the act of the legislature of this state, passed in 1869, a married woman is invested with the full control of her own earnings, with the right to sue for and collect the same in her own name.

This legislation, and the interpretation thereof by the courts, has wrought a most substantial change in the rights of married women under the laws of this state. At common law all a woman's personal estate, and the control of her real estate during coverture, passed, on her marriage, to her husband, she could make no contract during coverture, and contracts made

[1] *Mitchell vs. Carpenter*, 50 Illinois, 470.

even while unmarried could not be enforced at law, and only in a few exceptional cases in equity. Now the wife retains the control of all the property she had at her marriage, and which she acquires after marriage from any person other than her husband, and may make contracts in regard to the same during her coverture, which can be enforced either at law or in equity to the same extent as if she was sole.

At common law the earnings of the wife belonged to the husband, and he alone could sue for and collect the same.

Now the wife is absolute mistress of her own earnings, and can bring suit in her own name to collect them.

She may superintend her separate property, make binding contracts in relation thereto, devote her time to such occupation as is most congenial to her tastes and control her earnings.

She may, therefore, it seems to me, engage in trade either with or without her husband's consent, certainly with his consent, using her own property in the enterprise, and may bind herself by all contracts she makes in her business. She may own the whole of a stock of merchandise or the machinery and furnishings of a manufactory, and have the entire profits and be liable for the losses; and if she may own the whole there is certainly no obstacle to her owning a half or any other share of the stock. In other words, she may become a partner with another person, and why not with her husband? I can see nothing in the relation of husband and wife which would prevent the wife from being her husband's partner in business if she could be a partner with any other person. The logical effect of the statutes and decisions thereon in this state tend inevitably to this conclusion, and I can see no sound reason for stopping short of that point. I conclude, therefore, that Mrs. Kinkead could be and was a member of the firm of Kinkead & Co., and that it was a valid partnership at the time it was adjudged bankrupt.

In the case before me, Kinkead and his wife held themselves out to the world as partners in the trade of merchants—a relation which I think, as the law stood at the time, they had

the right to form. In that capacity they obtained credit and contracted debts to a large amount. The firm had assets on the faith of which credit had been given them. In the absence of positive proof upon the point, the court must presume that Mrs. Kinkead contributed her portion of the capital to start the business, and that she, as she lawfully might, has devoted her time, skill and business ability to the affairs of the firm. Her earnings, in other words, have gone into this business. If the business had proved successful she would have been entitled to her share of the profits, and a court of equity would have compelled an account between herself and husband in relation to the partnership transactions.

It is impossible for the court to say to which one of the individual members of this firm the credit was given, or rather it is not correct to say it was given to either. The credit was to the firm, and the copartnership assets are a trust fund for the payment of the partnership debts; and no individual creditor of either partner can be paid until the firm debts are paid. Mr. Manser, the creditor before the court, has not trusted this firm, and has not, in my opinion, any legal or equitable claim to any part of this fund till the copartnership creditors are paid. His debt was not contracted upon the faith of the assets now in the hands of the court, while the copartnership debts proved were many of them contracted in the purchase of the identical assets which came to the hands of the assignee.

For the purpose of this case, it is not necessary to decide that a married woman may be sued at law on her contracts or undertakings, as a court of bankruptcy is clothed with all the powers of a court of equity. And if Mrs. Kinkead, with the consent of her husband, could enter into copartnership with him or any other person, then she might be declared a bankrupt on the petition of creditors, or at least the firm as a business entity may be so adjudged for the purpose of distributing the assets among creditors. Here is a firm with assets and liabilities. Insolvency intervened, and the creditors of the firm have the first right to the assets. These a court

of bankruptcy will marshal and distribute in the manner required by the bankrupt law, as a court of equity would do in the absence of a bankrupt law, that is, it will apply the assets to the payment of the debts, which are an equitable lien on those assets, without regard to whether the creditors have any remedy at law or otherwise to enforce any unpaid balance.

The fact that Mrs. Kinkead was not individually adjudged a bankrupt does not, in my view, change the aspect of the case. Such an adjudication could only be necessary for the purpose of reaching her individual property, if she has any, which is not alleged, and she may yet be so adjudged if it becomes necessary in the course of these proceedings.

The application is, therefore, refused.

The rulings as to the application of the bankrupt law to married women varies in the different states, according to the several statutes concerning the rights and liabilities of married women, and the constructions of the state tribunals.

Since the above decision of Judge BLODGETT, made under the rulings of the Supreme Court of Illinois ending with *Cookson vs. Toole*, that court in the case of *Martin vs. Robson*, 5 Chicago Legal News, 304, has gone still further and swept away the ancient landmarks as to the rights and liabilities of *femes covert*, in an elaborate opinion by THORNTON, J., holding that even in cases of tort they may now be considered as occupying the legal position of *femes sole*.

In New York, where, since the statutes of 1848 and 1849, and the more recent amendments and the numerous decisions of the Court of Appeals, it is well known that married women may be sued at law on their contracts, It seems to have been taken for granted in the federal courts that they can be proceeded against in bankruptcy, and such has been the practice. *In re Mary O'Brien*, Bankrupt Register Sup. 38; *Graham, assignee, etc., vs. Stark*, 3 Bankrupt Register, 92. But under the rule in *Yale vs. Dederer*, 18 New York, 265, and 22 do., 450, at that time the leading cases on the subject, that in a suit against a married woman upon a promissory note, it must either appear on the face of the note that it was her intention to bind her separate estate, or it must be alleged that the note was given for the benefit of her separate estate, Judge HALL decided in *In re Howland*, 2 Bankrupt Register, 114, that a petition in bankruptcy must follow the same principle.

In the recent case of *In re Goodman*, October, 1873, to appear in a subsequent Volume of this Series, Judge GRESHAM holds that inasmuch as by the laws of Indiana a married woman is not bound by her contracts except

in reference to her separate property, and cannot enter a partnership with her husband, nor retain her personal earnings, a petition in bankruptcy against her, is fatally defective in not setting forth that she had a separate estate.

In Minnesota, where many of the common law disabilities have been removed by statute, and where a married woman may, under certain circumstances, engage in business in her own name, by obtaining a license from a probate justice, Judge NELSON held that where she engages in business as a member of a partnership, but without complying with the requirements of the statute, she could avail herself of her coverture to defeat bankruptcy proceedings against her. *In re Slichter*, 2 Bankrupt Register, 107.

The rule seems to be that any person capable of making a binding contract is amenable to bankruptcy proceedings, and that in so far as the common law disabilities of a *feme covert* are removed she comes within the jurisdiction of the law; that whenever a plea of coverture would not avail her in an action on the debt, she may be proceeded against in bankruptcy.

It was upon this principle that when, in 1772, the commissioners refused to find Mrs. Ann Fitzgerald a bankrupt, because, although having a separate property, she was a *feme covert* residing in the county of Middlesex, and not a trader in the city of London, Lord Apsley, on appeal, ordered the commissioners to declare her a bankrupt. The authority of this case is supported by Lord MANSFIELD in *Ringsoll vs. Longborough*, 3 Douglass, 197, and *Corbett vs. Pœlnitz*, 1 Term R., 5.

The same general principle is evidently the reason of the rule according to which persons who could not otherwise have been proceeded against in bankruptcy have by trading become amenable to the proceedings, even though such trading may have been positively prohibited by law. Thus a clergyman may be a bankrupt—*Ex parte Meymot*, 1 Atkyns, 196; even though in priest's orders—*Hankey vs. Jones*, Cowper, 745. A public officer—*Highmore vs. Molloy*, 1 Atkyns, 206.

The remedy for the creditor by petition would certainly seem to be at least co-extensive with the liability of the debtor; for an infant, if he has held himself out as a trader, and *sui juris*, has been held amenable—*Ex parte Adaire*, 1 Vesey and Beames, 494; or has affirmed the debt after attaining his majority—*Belton vs. Hodges*, 9 Bingham, 369; or if at the time of contracting the debt he made express statements that he was of age—*Ex parte Watson*, 16 Vesey, 265.

The doctrine that a *feme covert* who has been deserted by her husband, and trading as a *feme sole*, should be held liable on her debts, has the authority of the United States Supreme Court, in *Rhea vs. Rhenner*, 1 Peters, 108.

In England, as far back as the earliest days of the custom of London, a married woman, who as a trader had contracted debts, might be proceeded

against in bankruptcy. *Lavie vs. Philips*, 3 Burrow, 1783; *Ex parte Carrington*, 1 Atkyns, 206; *Ex parte Franks*, 7 Bingham, 762.

But the leading English case is *Johnson vs. Gallagher*, 30 Law Journal, 298, in which Turner, L. J., elaborately discusses the rights and liabilities of married women. This case was expressly approved in Mrs. Matthewman's case, Law Reports, 3 Equity Cases, 781; *Picard vs. Hine*, Law Reports, 5 Chancery Appeals, 274; and by Lord ROMILLY, Master of the Rolls, in *McHenry vs. Davies*, Law Reports, 10 Equity Cases, 88. All of these decisions were prior to the passage of the married woman's property act of August 9th, 1870.

Impossible as it may be to reconcile the decisions on the general question of the rights and liabilities of married women, the duty of the federal courts in administering the Bankrupt Act would seem to be simply to determine the status of a married woman under the existing laws of the state where the jurisdiction is to be exercised, and administer the act upon the basis of the principles thus discovered. The foundation of bankruptcy proceedings is indebtedness; but the Bankrupt Act does not make any new standard of liability—it simply operates upon those already existing. The application of the act to married women depends, clearly, not upon their rights but their liabilities, and those liabilities are determined by the law of the forum where the jurisdiction is invoked. [*Reporter.*

Since the above was in the stereotype plates, and just as the volume was going to press, the above decision of Judge BLODGETT has been affirmed by Judge DRUMMOND, in the Circuit Court, on review — decision January 31st, 1874, but no opinion delivered. Consult, also, opinion of Illinois Supreme Court, *Haight vs. McVeagh, et al.*, filed January 26th, 1874, and reported in 6 Chicago Legal News, 151. [*Reporter.*

In re COLLINS.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1873.

IN BANKRUPTCY.

1. A married woman may be a voluntary as well as an involuntary bankrupt.

This was a motion by Charles Botto, a creditor of the bankrupt, a married woman, to set aside and dismiss the bankruptcy proceedings. The facts appear in the opinion.

Wm. T. Burgess, for the motion, contended that a claim against a married woman is in the nature of a *charge* against her estate, not a debt against her; and that she has not the capacity to contract debts, citing *Carpenter vs. Mitchell*, 54 Illinois, 127; *Parent vs. Callerand*, 5 Chicago Legal News, p. 159.

J. B. Leake, for bankrupt.

BLODGETT, J.: On the 28th day of November last, Harriet E. Collins, of this city, filed her petition before the register in bankruptcy for this district, asking to be adjudged a bankrupt. It was a voluntary proceeding on her part, setting forth that she was insolvent and unable to pay her debts, and bringing herself, as far as the petition appeared, strictly within the bankrupt law. The adjudication was entered and the proceedings went on under the usual *pro forma* course until the 14th of December, when Mr. Charles Botto appeared in this court and represented, by his petition and proofs, that he was a creditor of Mrs. Collins; that she was a married woman; that he had brought suit in the Superior Court of Cook county, Illi-

nois, which had proceeded to a judgment, and that he was then in process of collecting his judgment when he was interfered with by the proceedings in bankruptcy, which had stopped him from enforcing his individual claim, and suggesting to the court that Mrs. Collins, being a married woman, could not avail herself voluntarily of the provisions of the bankrupt law, and be adjudged a bankrupt.

It is obvious that the principles I have already laid down in the Kinkead case apply with equal force to this case. I can see no difference between the voluntary and involuntary proceeding, so far as the ability to adjudge a woman bankrupt is concerned.

Mrs. Collins was engaged as a trader in this city. She had a husband, but he took no interest in the business; she was to all intents and purposes the sole trader, and becoming insolvent and desiring to avail herself of the provisions of the bankrupt law, surrendered her property, which was quite considerable, to the jurisdiction of the court, and asked to be relieved. I think the principles I have laid down in the Kinkead case, that a married woman could lawfully engage in business and incur liabilities, justify her in coming to this court, and the court in taking jurisdiction of the case.

The motion of Botto to set aside these proceedings will be overruled.

That a married woman may be a voluntary bankrupt. *In re O'Brien*, Bankrupt Register Supplement, 88.

This is also the English rule, Roche & Hazlitt's Law of Bankruptcy, 357 *et seq*,

Consult also *In re Kinkead*, preceding case, and *In re Goodman*, September, 1873, to appear in subsequent Volume of this Series. [*Reporter*.

UPTON, ASSIGNEE, ETC., VS. HANSBROUGH.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1873.

IN BANKRUPTCY.

1. LIABILITY OF STOCKHOLDERS FOR UNPAID BALANCES.—In an action by the assignee of a corporation organized under the Illinois statutes, against a stockholder to recover the amount unpaid on his stock, it is not a sufficient defense that the corporate proceedings have not been strictly in accordance with the statute.

2. INCREASE OF CAPITAL.—Where an insurance company has attempted to increase its capital and filed papers for that purpose, received subscriptions for and sold stock under such increase, and incurred liabilities upon policies of insurance bearing upon their face evidence of such increase, this is sufficient to constitute the company a corporation *de facto*, so that neither it nor its stockholders can object that it is not a corporation *de jure*.

3. STOCKHOLDER—WHEN ESTOPPED.—Where, to the public, a company had all the external *indicia* of being a corporation and legally entitled to exercise the rights and franchises it assumed, a person voluntarily taking stock in such company is not in a position, when sued for the balance due for such stock, for the benefit of creditors of the company, to deny the authority of the company to issue such stock, or his liability thereunder.

4. A provision in the charter requiring the corporation to take securities for their stock to a certain amount, does not prohibit it from afterwards selling stock upon other terms, or without security.

5. COURT MAY MAKE ASSESSMENT.—A provision in the subscription and the stock certificate that the balance was to be paid on the call of the directors *when ordered by a vote of a majority of the stockholders themselves*, does not prevent this power being effectually exercised by this court.

6. Though no assessment or call pursuant to the terms of the subscription was made before proceedings in bankruptcy, this court became vested with all the power and control previously vested in either the chartered officers of the company or stockholders, or both collectively.

7. FRAUD BY AGENTS.—The fact that the agents and officers of the company represented to the stockholders at the time of their purchase that no assessment would ever be made, and that the stock was in fact non-assessable, or made other false and fraudulent statements in regard to the con-

dition of the company, are inadmissable as evidence, and constitute no defense as against the creditors of the company.

8. NOTICE DISCRETIONARY.—This court having the power to require the stockholders to pay the balance due on their stock, it is discretionary whether it shall exercise it without notice to the stockholders. At all events, in a suit by the assignee against a stockholder such order cannot be reviewed.

9. The fact that the call was for more than was necessary to pay the debts of the company can not be tried in an action against an individual stockholder.

10. RELEASE OF UNPAID BALANCE NOT BINDING.—A resolution passed by the directors of the corporation releasing the stockholders from the payment of balances unpaid upon the stock, in accordance with which the certificates of stock were stamped non-assessable, is not binding upon parties who had insured without knowledge of its existence.

11. PURCHASER OF STOCK LIABLE.—The purchaser of a certificate of stock who surrenders it and has one issued to himself, and his own name entered upon the stock books, becomes subrogated to the rights and assumes the liabilities of an original subscriber.

The Great Western Insurance Company, of Chicago, was organized in 1857, under a special charter granted by the legislature of the state of Illinois, with an authorized capital of one hundred and fifty thousand dollars ($150,000). But little business was done by the company until the summer of 1870, when it was reorganized under the general law of 1869. (Gross' Statutes, 1871, c. 53,) and acquired the right to increase its capital stock to five million dollars ($5,000,000), and actually increased it to about one million three hundred thousand dollars ($1,300,000), issuing certificates to various persons and only requiring twenty (20) per cent. to be paid in.

The Chicago fire of October 9th, 1871, rendered the company completely insolvent, the most of the stockholders at that time having paid in but twenty per cent.; in a few cases forty per cent. had been paid.

A petition in bankruptcy was filed against the company on the 17th of January, 1872, upon which adjudication was had February 6th, and on the 11th of April of the same year Clark W. Upton was appointed assignee, who soon thereafter filed a petition in the district court in bankruptcy for an order

against all the stockholders to pay in the amount unpaid on the stock held by them respectively, and an order was entered requiring them to do so by the 15th of August, 1872. Default having been made, the assignee brought suits against the different stockholders for the amount remaining unpaid by each of them.

Motion for new trial after verdict by a jury for $11,700.

This opinion applied directly to thirteen cases against different stockholders, in which judgment was rendered at this term.

Upton, Boutell & Waterman, for assignee.

Stockholders are liable to company or its creditors for the amount unpaid on its stock. *Sagory vs. Dubois*, 3 Sanford Chan. R. 509; *Hartford, etc., Railroad Co. vs. Kennedy*, 12 Connecticut, 449; *McClure vs. Wilson*, 43 Illinois, 356.

And this liability exists although the stockholder obtained his stock by assignment from another. *Hartford, etc., Railroad Co. vs. Boorman*, 12 Connecticut, 530; Angel & Ames on Corporations, § 534; *Huddersfield Canal Co. vs. Buckley*, 7 Term R. 36; *Hall vs. U. S. Insurance Co.*, 3 Gill, 480; *Bingham vs. Mead*, 10 Allen, 245.

The officers and stockholders cannot alter or modify the liability of stockholders to the prejudice of creditors of the corporation. *Attorney General vs. Fishmonger's Company*, 2 Beavan, 599.

An agreement of the directors of a corporation not to make further calls upon the stockholders, is wholly nugatory and void. 2 American Railway Cases, 539; *Sagory vs. Dubois*, 3 Sanford's Chancery R. 509.

Interest upon calls made will be charged from time the same were due. *Sagory vs. Dubois*, 3 Sanford's Chancery R. 546.

A defect in the proceedings to organize a corporation is no defense to a stockholder sued for amount unpaid upon his stock, or to any person who has participated in acts of user as a corporation. *Ellis vs. Schmoick*, 5 Bingham, 521; *Harvey*

vs. Kay, 9 Barnewall & Cresswell, 356; *Eaton vs. Aspinwall*, 19 New York, 119; *Abbott vs. Aspinwall*, 26 Barbour, 202.

Nor can any person incurring a debt to a company, set up as a defense thereto any irregularity which might show that the corporation never existed. The doctrine of *estoppel en pais* applies. *McFarlan vs. Triton Insurance Co.*, 4 Denio, 392; *Schenectady, etc., Plank Road Co. vs. Thatcher*, 1 Kernan, 102.

Sleeper & Whiton, for defendant, Hansbrough.

Hitchcock, Dupee & Evarts, Monroe, Bisbee & Gibbs, Edward Roby, Thompson & Bishop, and *Cooper, Garnett & Packard*, appeared for the other defendants, and argued the cases.

Hopkins, J.: This case, together with several others brought by the above plaintiff as assignee in bankruptcy of the Great Western Insurance Company, against parties alleged to have been stockholders in such company, to recover the balance due for the stock held by them, now comes before the court for review on motion for new trial filed by defendants against whom verdicts were rendered. The main points relied upon by the defendants were very fully discussed upon the trial and have also on this motion been elaborately presented by the counsel for the various defendants.

I expressed my views upon them so fully during the trials and in my charges to the jury, it seems almost a work of supererogation to go over them again, but as I have had more time for reflection and examination, I will briefly state my decision, and the reasons therefor. The first point urged by the defendants, and which was common to all, was that the plaintiff had failed to show the legal organization or existence of the bankrupt company. that the plaintiff had also failed to establish the right of the company to increase its capital stock. The plaintiff gave in evidence the charter of the company granted in 1857, and also the proceedings taken by it in

1869 and 1870 to increase its capital stock, which the defendants objected to as not in compliance with the statutes. The plaintiff also showed an issue of an increased amount of capital stock after such proceedings, and the transaction of the business of insurance in the ordinary way.

If I were to examine those proceedings with the same strictness in this case as in a proceeding on behalf of the state to annul or forfeit the charter, I might find some difficulty in upholding them. But I understand the rule to be well settled that where papers having color of compliance with the statutes have been filed with the proper state officers, and meet their approval, but are in fact so defective as to be incapable of supporting the corporation as against the state, they are, as against a subscriber to its capital, held sufficient to constitute a corporation *de facto*, if supported by proof of user. This company attempted to increase its capital, filed papers for that purpose in the office of the auditor, received subscriptions for and sold its capital stock under such assumed increase, received part payment thereon, and incurred large liabilities upon policies of insurance issued by it bearing upon their face evidence of such increase of its capital stock. This was sufficient to constitute the company a corporation *de facto*, so that neither it nor its stockholders can object that it is not a corporation *de jure*.[1]

In the matter of the Reciprocity Bank, 22 New York, 9 and 17, the court say: "If a party makes an actual purchase of shares from a company or an individual holder, and voluntarily allows himself in this manner to be represented to the world as a stockholder, he must take the responsibilities of that situation; the person who has caused or allowed his title to be registered on the books, cannot deny the truth of that representation and disavow the ownership when it ceases to be a benefit and becomes a burden." To the public this company had all the external *indicia* of being the corporation, and

[1] *Buffalo & Alleghany Railroad Co. vs. Cary*, 26 New York, 75.

legally entitled to exercise the rights and franchises it assumed to exercise. A party voluntarily taking stock in such company, is not in a position, when sued for the balance due for such stock, for the benefit of the creditors of such company, to deny the authority of the company to issue such stock and transact business lawfully.[1]

These authorities settle the question that the defendants are estopped in these actions from questioning the right of the corporation to issue the stock held by them.

The next question discussed was, that as the company, by its charter, was required to take a certain kind of securities for the stock, to the amount of one hundred thousand dollars, such limitation should be held to apply to all stock issued by the company, and to prohibit it from selling stock without the balance unpaid being secured in that way; and as this stock was issued upon other terms, or upon the simple promise or implied obligation to pay the balance without any security therefor, it was claimed that the contract was contrary to the spirit and intent of the statute, and therefore void. I do not think the charter susceptible of such a construction; that provision was simply to require a certain amount of cash or secured capital before it commenced business, and after it had that amount I see nothing in the act or public policy to prevent it from disposing of its stock upon such terms as it might deem best.[2] Insurance companies are organized upon a different hypothesis from banks, railroads, and manufacturing companies. The capital of an insurance company is not active, or usually

[1] *Eaton vs. Aspinwall*, 19 New York, 119; *Harvey et al. vs. W. Kay*, 9 Barnewall & Cresswell, 356; *Doubleday vs. Muskett*, 7 Bingham, 110; *White vs. Coventry*, 29 Barbour, 305; *Trumbull Co. Ins. Co. vs. Horner*, 17 Ohio, 407; *Parish vs. Wheeler*, 22 New York, 494; *Steam Navigateon Co. vs. Weed*, 17 Barbour, 378; *Doyle vs. Peerless Petroleum Co.*, 44 do., 239; *Dutchess Cotton Manufactory vs. Davis*, 14 Johnson, 238; *Henriques vs. Dutch West India Co.*, 2 Lord Raymond, 1535.

[2] *Hart vs. Tims*, 3 Edwards' Chancery, 226.

required to meet its ordinary obligations; hence it is usual to issue its stock upon the payment of a small per cent. and leave the balance unpaid, subject to call, as a part of its capital whenever the emergency arises. Such unpaid balance is regarded as a part of its capital as much as if it were collected and in its treasury. Insurance contracts are contracts of indemnity, and the premiums are usually so fixed as, under ordinary contingencies, to be sufficient to pay all losses that may accrue without using any portion of the capital; while with banks, railroads, and manufacturing companies the capital is required to be used and invested in the corporate business, so that the difference between the *paid up* capital of insurance and other moneyed corporations is usually very great.

Another point of objection was taken, based upon the peculiar terms of the subscription and the stock certificate, in reference to the payment of the eighty per cent. unpaid upon the capital stock of the company. Those terms were that the balance of eighty per cent. was to be paid on the call of the directors, *when ordered by a vote of the majority of the stockholders themselves*. The defendants claimed that they could not be made liable in any other way than by a call made in that manner; that the authority to assess could not be delegated so as to be effectually exercised, either by a court or any other parties; that there was no power vested in any court or body of men or directors to assess the stockholders, unless they directed or consented to it themselves. This presents certainly a novel question, being nothing more nor less than a claim that a party may legally and morally owe a debt and yet frame a contract so that its payment shall be wholly discretionary, and not subject to be enforced in the courts without his consent. It is not necessary to decide whether a provision of that kind would not be contrary to the principles of remedial justice as between the parties themselves, and therefore void; but whether so or not, the attempt to set up such a defense as against the creditors of the company who have entered into contracts with it without knowledge of any such stipulation, and whose only

means of obtaining payment is by compelling stockholders to pay the balance due upon their stock, is without a parallel in judicial proceedings. Such a scheme I do not think ever has, or ever can, receive the sanction of the legislature or of the courts. A *law* which should deprive creditors of a corporation of all legal remedy would be invalid, as impairing the obligation of contracts.[1]

The insurance company became bankrupt by the losses sustained in the great fire in the city of Chicago, in October, 1871. Its means and capital consisted principally of these balances unpaid by the stockholders. It being unable to continue, the creditors proceeded against it in this court in bankruptcy. No assessment was made, according to the terms of the subscription, before the bankruptcy proceedings. The question therefore resolves itself into one of *power* of the bankrupt court. Such courts have original and exclusive jurisdiction to collect all the assets of the bankrupt, and to make final settlement and distribution of the bankrupt's estate. After the commencement of the proceedings in bankruptcy neither the chartered officers nor stockholders had any right to interfere with the collections or distribution of the estate. All power over the estate and the assets of the company became thereby vested in the bankrupt court, and I think it necessarily follows that such court became vested with all the power and control over the assets that were previously vested in either the chartered officers of the company or the stockholders, or both collectively, and that court could, by virtue of its authority, make or direct any assessment or call necessary or preliminary to the collection of the assets, as fully, to all intents and purposes, as the stockholders or directors could have done if the company had not gone into bankruptcy. It was held in *Ward vs. Griswold Manufacturing Company*, 16 Connecticut, 593, that the authority of the directors to make calls upon stockholders was modal only, relating to the time and manner of payment, and

[1] *Curran vs. Arkansas*, 15 Howard, 304.

that such duty might be performed by the court of chancery. If the court had the power to do what the directors ought to have done in that way, why can it not do what the directors and stockholders ought to have done as well? No reason for a distinction is perceivable. In *Adler vs. Milwaukee Bank Company*, 13 Wisconsin, 61, Dixon, Ch. J., in discussing the liability of stockholders to pay for their stock upon call of the directors, says when the company is indebted "this duty of the directors to make the call is one of the highest of moral obligations," and further, "if by the willful or stubborn inaction of the directors or stockholders the company fails to meet its obligations and perform its duties (to make assessment), a court of equity will, on a proper application, afford the requisite relief."

It is not within the ingenuity of man to devise a scheme that will enable insolvent debtors and persons indebted to them to withhold from the creditors of such insolvents the assets which in equity and good conscience should be applied to the payment of such creditors. Courts of equity, by virtue of their inherent jurisdiction over trusts and frauds, will enforce the proper application of the capital stock of an insolvent corporation to the payment of its debts.

It is the province of courts of equity—and of the bankruptcy courts, which to a certain extent have co-ordinate power—to furnish adequate remedies to reach and administer insolvent estates, and to secure to their *bona fide* creditors the application of all the property of such insolvent, and to dissipate all schemes and devices for the prevention thereof.

In connection with this, in some of the cases it was proven, or offered to be proven, that the agents and officers of the company represented and assured the parties when they took the stock that no assessment would ever be made; that it was, in fact, non-assessable, and made other false and fraudulent statements in regard to the condition of the company, to induce the parties to take the stock. I hold such testimony inadmissible and as not constituting any defense as against the creditors

of the company; that it was too late for the stockholders, after the company had become insolvent and the investment was found to be unprofitable, to avoid the liability on such grounds or pretense. The case of *Ogilvie vs. Knox County Insurance Company*, 22 Howard, 380, I think fully sustains my ruling on that point. The parties, when they became stockholders, had full access to the books, and could have examined them and ascertained the condition of its affairs, and are chargeable, as between them and the creditors, with knowledge of the contents, and are therefore to be held as having possessed full knowledge of the affairs of the company, and, to avail themselves of any false representations which had been made should have withdrawn immediately from the company.

The defendants also objected to the order of the court sitting in bankruptcy, requiring the stockholders to pay the balance due and owing upon their stock, on the further ground that the court had no power to make such order without notice to each stockholder. If the court had the power to make the order, as I have attempted to show it had, I think it was discretionary with it either to require notice or not; at all events in this suit its order in this respect cannot be reviewed.

I think the stockholders, who are the integral parts of a corporation, may be considered as *quasi* parties to the bankruptcy proceedings to such an extent as to be bound by the order without notice. If they were dissatisfied with the order, they, by their relation to the bankrupt corporation, had such a standing in the bankrupt court as enabled them to move in that court to set aside the order, if improvidently made, or to apply for a review in the circuit court under section two of the bankrupt act. Having omitted their plain rights in that respect they are concluded by the order in these suits. It was suggested by some of the counsel that the call was for more than was necessary to pay the debts of the company. That question cannot be tried in this case. The order of the district court, it having jurisdiction over that matter, is conclusive, and not inquirable into collaterally. Lord Eldon says in *Ex parte Hewdry*,

15 Vesey, 498, "that a commission in bankruptcy is nothing more than a substitution of the authority of the lord chancellor, enabling him to work out the payment of those creditors who could by legal action or equitable suit have compelled payment."

That being so, the bankruptcy court had the same authority and jurisdiction over this company and its effects as the chancellor would have had upon a bill filed to reach its property and equitable assets. In such a suit he would appoint a receiver, and could direct a receiver to make an assessment upon the stockholders without making them parties to the bill. *Ogilvie vs. Knox County Insurance Company*, 22 Howard, 380. If the chancellor in such a case could authorize his receiver to make a valid assessment collectable by the receiver at law, I think a court of bankruptcy could do the same. I was not referred to, nor have I been able to find, a case where a court of chancery required a notice to the stockholders before making, or directing its receiver to make, an assessment upon the stockholders for balances due from them to the company, and therefore am forced to believe that no such rule or practice exists in a court of equity. Upon principle they might as well claim that the stockholders should be personally notified of and allowed to defend all debts proven against the estate, as their interests would be much more affected by those than by an assessment.

The defendants, for a further defense, gave in evidence a resolution passed by the board of directors some time in the year 1870, releasing its stockholders from the payment of the eighty per cent. unpaid upon their stock, after which they issued certificates stamped "non-assessable." The certificates upon their face, however, stated that only twenty per cent. had been paid, and the balance was subject to call in the manner hereinbefore stated. This resolution was not communicated to the public, but only to the stock agents and person employed in disposing of the stock. The officers, in their report to the state auditor, showing the condition of the company, as required by

the statute, made no reference to such a resolution, but stated in their report of December, 1870, that there was eighty per cent. unpaid upon its stock, and made no exception as to stock issued after the passing of that resolution. I ruled on the trial that this resolution, if valid, virtually reduced the capital of the company four-fifths, and that it was not binding upon parties who had insured without knowledge of its existence. Its object manifestly was to enable the stockholders to enjoy the profits of the business, if successful, and avoid liability, if unsuccessful — casting the hazards wholly upon the creditors. Subsequent reflection has confirmed my impression upon that point. To sustain it as against the creditors would be against the fundamental principles of law and justice, and without hesitation I pronounce it legally fraudulent and utterly inoperative.

A secret arrangement of that kind between stockholders is so palpable a fraud upon the creditors dealing with the company without knowledge of it, that I shall not spend time in further discussing it. But it was claimed in connection with this, by the defendants' counsel, that it was good as between the company and the stockholders, and that the plaintiff, as the assignee of the company, could only enforce such claims as the company might. Such is not my understanding of the authority of an assignee in bankruptcy. I think he represents the interests of the creditors, is a trustee for the benefit of the creditors, and any defense that would not be good as against them in an equitable suit is not maintainable as against an assignee in bankruptcy. His position is analogous to that of a receiver appointed by a court of chancery.

In some of the cases the question was raised as to whether there was any liability on the part of the stockholders to pay the nominal or par value of the shares of stock held by them. The liability of some of the defendants was direct, as some of them were original subscribers, and agreed to take and pay for their stock. In other cases the parties had purchased stock from third parties, and had taken an assignment of the certifi-

cate and surrendered it, and accepted a new certificate in their own names, whereby they became registered members of the corporation, and entitled to all the privileges and advantages of an original subscriber, and succeeded to all the liabilities, as well as the rights, of the original subscriber.[1] The question as to whether there is any liability as against an equitable owner of stock, or whether the relation may be made out by any other evidence than the certificate and the company's stock book, is pending before me, in another case, and I do not now express any opinion thereon. I only hold that a purchaser of a certificate who surrenders it, and has one issued to him directly, and has his name entered upon the stock books, becomes subrogated to the rights and assumes the liability of an original subscriber to stock; that the acceptance of the certificate of which eighty per cent. was unpaid and subject to future call, created an implied obligation on his part to pay such balance, the same as an assignee of a lease is liable for rent directly to the landlord after assignment.[2]

A question as to the sufficiency of the pleadings was raised by some of the defendants. I do not consider the objections well taken. In behalf of some of the defendants the motion was urged on the ground that the verdicts were contrary to evidence. I should have been as well satisfied if the verdicts in some of the cases had been for the defendants; but I do not think there is such a want of evidence to support them as to authorize me, in the exercise of a sound discretion, to set aside any of the verdicts on those grounds.

The motions by the defendants for a new trial are each and all denied.

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[1] *Seymour vs. Sturgis*, 26 New York, 134; *Sagory vs. Dubois*, 3 Sanford, Chancery, 466; *Hartford and New Haven Railroad Company vs. Boorman*, 12 Connecticut, 530; *Huddersfield Canal Co. vs. Buckley*, 7 Term Reports, 36; *Loomer vs. Wheelwright*, 3 Sanford, 161.

[2] *Armstrong vs. Wheeler*, 9 Cowen, 88; *Churchwardens vs. Smith*, 3 Burrows, 1272; *Eaton vs. Jacques*, 2 Douglas, 461.

Upton, Assignee, etc., vs. Hansbrough.

In an action against a stockholder for installments of his subscription the regularity of the organization of the company cannot be inquired into collaterally. *Rice vs. Rock Island and Alton Railroad Company*, 21 Illinois, 93; *Goodrich vs. Reynolds, Wilder & Co.*, 31 Illinois, 490.

For the liability of a purchaser of stock, whose certificate has never been assigned on the books of the company, see *Upton, Assignee, etc., vs. Burnham*, following case; same case, May, 1873, *post*, p. 520.

The question of the liability of the stockholders of this company, was also decided by Judge DILLON, in the Minnesota District, who held substantially the same views as Judge HOPKINS, *supra*, *Payson, assignee, etc., vs. Stoever*, June Term, 1873, reported in 2 Dillon's Reports, 427.

A similar ruling was also made by Judge GARY, of the Superior Court of Cook county, in a suit by the assignee against Willins, a stockholder, the opinion being given after full argument, but never reported except in pamphlet form.

In the suits against the stockholders, in the circuit courts of Indiana, Judge DRUMMOND, at the May Term, 1873, held them liable for the assessment on their stock. *Payson, assignee, etc., vs. Withers*, to appear in a subsequent Volume of this Series. [*Reporter*.

UPTON, Assignee, etc., vs. BURNHAM.

District Court—Northern District of Illinois—January, 1873.

In Bankruptcy.

LIABILITY OF STOCKHOLDER.

1. Formal Transfer on Books may be Waived.—A provision in the by-laws of a corporation requiring transfers of its capital stock to be made upon its books may be waived by the company, and if waived at the request of a purchaser of the stock, or with his assent, he becomes a stockholder, and directly liable for future assessments.

2. Mutual Recognition may Establish Relation of Stockholder.—Slight evidence of mutual recognition of the relation of stockholder may establish the legal position and liability.

3. A purchaser of stock taking an assignment in blank may, nevertheless, be liable for future assessments.

Motion for a new trial, after verdict for an unpaid subscription to stock, in a suit by the assignee in bankruptcy.

The defendant, Telford Burnham, in the spring of 1871, purchased of one M. F. Hale fifteen shares of stock, of $1,000 each, in the Great Western Insurance Company of Chicago, upon which only twenty per cent. had been paid. The certificates were what were called "non-assessable," having those words stamped across their face, and contained the further clause that they were only transferable upon the books of the company upon surrender of the certificate, and were indorsed by Hale in blank, and so delivered.

Burnham never had the certificates transferred to him on the books of the company, but about the time of taking the certificates he inquired of the president of the company concerning their value, and stated that he did not wish them transferred to him, as he wished to avoid any liability.

The insurance company became insolvent at the time of the fire of October 9th, 1871, but afterwards advertised that it would resume business, and the defendant, soon afterwards, going to the office of the company to inquire about its condition, was asked by one of the officers if he did not own some stock, to which he replied that he had taken some in a trade, but it had never been transferred to him; and on the request of the officer he showed him the certificate, from which a clerk in the office took a memorandum and entered defendant's name as a stockholder on the stock register, which they were then making up, all the books and papers of the company having been destroyed.

The company afterwards was adjudicated a bankrupt on creditors' petition, and Clark W. Upton appointed assignee by the court, and an assessment was made upon the stockholders for the unpaid balances on their respective stock.

Boutell & Waterman, for assignee.

Hitchcock, Dupee & Evarts, for defendant.

HOPKINS, J.: Adhering to the views I expressed upon the trial, that the mere assignment of the certificate did not of itself constitute the assignee a stockholder, or create a liability upon the part of such transferee to pay the company the assessment in controversy, in support of which see *Humble vs. Langston*, 7 Meeson & Welsby, 517; *Helm vs. Swiggett*, 12 Indiana, 194; *Mann vs. Currie*, 2 Barbour, 294; *Worrall vs. Judson*, 5 do., 210; *Adderly vs. Storm*, 6 Hill, 624; *The Marlborough Manufacturing Company vs. Smith*, 2 Connecticut, 579; and also that an equitable holder of stock is not liable to the corporation for stock assessments, *Newry Railway Company vs. Moss*, 14 Beavan, 64, still, I think I erred in directing a verdict for the defendant instead of submitting to the jury the question as to whether the conduct of the defendant was not equivalent to a request or assent on his part to the entry of his name upon the stock book as a stockholder, and

also whether the company had not, by entering his name as a stockholder in the stock register, given him the position of a legal member, and recognized the transfer to him as sufficient, notwithstanding its want of conformity to the formal transfer contemplated by its by-laws. There was some testimony given tending to show such facts which, I think, should have been left to the jury.

The provision requiring the transfers to be upon the books was for the benefit of the company, and the company could waive it, and if waived at defendant's request or with his consent, express or implied, he would be liable directly to the company for future assessments.

The registry of his name upon the books as a stockholder gave him all the rights of a stockholder, the right to vote and participate in dividends, and converted that which was before an equitable into a legal relation, upon which his liability for assessments would attach.[1] A new certificate was not necessary to constitute him a stockholder.[2] At the time of the assessment he was a registered stockholder, and as that gave him certain rights and benefits in the company, the law presumes that the registry was at his request.[3]

The assignment of the certificate with notice to the company conferred protection as against creditors of the assignee, and restrained the company from transferring or consenting to the transfer to any other party without incurring liability to him.[4]

It was the duty of the defendant, as between him and the assignee, to pay all assessments after the transfer, although not registered.[5]

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[1] *New Albany Railroad Company vs. McCormick*, 10 Indiana, 499.

[2] *The Chester Glass Company vs. Dewey*, 16 Massachusetts, 94; *The Chouteau Spring Company vs. Harris*, 20 Missouri, 382.

[3] *Tompkins vs. Wheeler*, 16 Peters, 106.

[4] *Black vs. Zacharie*, 3 Howard, 483.

[5] *Brigham vs. Mead*, 10 Allen, 245; *Shaw vs. Rowley*, 16 Meeson & Welsby, 809; *Walker vs. Bartlett*, 36 English Law and Equity, 368; *Huddersfield Canal Company vs. Buckley*, 7 Term, 36.

The cases hold that upon an assignment good as between the parties, this duty attaches. In *Hall vs. The United States Insurance Company*, 5 Gill, 484, it is held that when a purchaser of a stock certificate paid an assessment, without being registered as required by the charter, he was estopped from setting up such want of registry in an action afterwards brought to collect another assessment; that in paying he had acknowledged his obligation, and was liable to the company as a stockholder without being registered.

In *Chittenham and Great Western Railway Company vs. Daniels*, 7 English Railway Cases, 728, it is also held that a purchaser may be estopped by his representations and made liable for calls before his name is actually substituted upon the registry. See also pages 735 and 870 for other cases to same effect, and *Eames vs. Wheeler*, 19 Pickering, 442.

The doctrine seems to be well settled that a certificate to a party, or registry of his name upon the stock register, is not absolutely necessary to constitute the legal relation or privity. The purchaser may waive it and be held liable without either a certificate or registry of his name. The corporation may waive the formal transfer and register the purchaser's name without any other transfer than the assignment in blank of the certificate.

In view of these principles and the equitable obligations of the purchaser to pay subsequent assessments, slight evidence of mutual recognition by the corporation and purchaser of the relation of stockholder might be sufficient to change the equitable relation into a legal one, so as to make the purchaser liable directly to the company, and I am not prepared to say that the jury in this case might not have been warranted, upon the facts shown, in finding the defendant a stockholder, notwithstanding that a certificate of stock had never been issued to him.

The company after registering his name, as such, would be estopped from setting up that the formal transfer was not made, and after having registered his name it is very question-

able whether it could collect of the original holder future assessments, or be allowed to question the sufficiency of the assignment. The company having accepted and substituted another party as stockholder, the liability of the original subscriber ought to terminate with his rights as stockholder.[1] In this case the provision in regard to the mode of transfer is in the by-laws and not in the charter, and it may be that its observance is not as indispensable to vest the title in the assignee as it would be if it were in the charter.[2]

Certain principal facts were proven, not admitting of doubt or controversy, while certain others were proven, not of themselves decisive, but as forming the foundation of inferences or conclusions, which inferences or conclusions were for the jury to find. I take it, if the jury should find that both parties waived a formal transfer, they would be bound by such waiver.

In view of these considerations I think a new trial should be granted.

At the next trial of this case, at the May Term, 1873, before BLODGETT, J., and a jury, *post*, 520, a verdict was rendered against the defendant for the unpaid balance on his stock, $12,000 and interest. The case is now pending in the Supreme Court.

See also *The British and American Telegraph Company vs. Colson*, 6 Law Reports, Exchequer Cases, 108, and *Hebbs' Case*, 4 Law Reports, Equity Cases, 9, and cases there cited, where the defendants were held not stockholders, as having never duly accepted the allotment of shares.

[*Reporter.*

[1] *Shortridge vs. Bosanguet*, 17 English Law and Equity, 331; *Ex parte Bagge*, 4 English Law and Equity, 72; 1 Redfield on Railways, 41, and note.

[2] *Chambersburg Insurance Company vs. Smith*, 11 Pennsylvania State, 120; 1 Redfield on Railways, § 42.

In re HOYT.

DISTRICT COURT—WESTERN DISTRICT OF WISCONSIN—JANUARY, 1873.

IN BANKRUPTCY.

1. LIEN OF MECHANIC RELATES BACK.—Under the Mechanics' Lien Law of Wisconsin, the liens relate back to the commencement of the building, without reference to the time when the work was actually done or materials furnished.

2. PRIORITY.—Such liens take precedence of a mortgage given after the commencement of the work.

3. But as between mechanics there can be no priority.

This was a petition filed by mechanics to obtain priority of payment out of the funds in court as against the mortgagee of the same premises.

About the middle of April, 1871, the bankrupts commenced the building of a hotel at Chippewa Falls, and on the 10th day of July, 1871, they gave a mortgage to Romeo H. Hoyt for $15,000, upon the premises covered by the hotel building then in process of erection, which mortgage was recorded on the day following. Work was continued on the building after the giving and recording of the mortgage, and new contracts were thereafter made for work and materials therefor. The bankrupts not paying such debts either for materials or work done before or after the mortgage, the parties filed liens upon the building in pursuance of the provisions of the statute of the state. Subsequent to the completion of the building, the proprietors were proceeded against in bankruptcy and adjudged bankrupts, and the property, by this court, ordered to be sold free and clear of all liens.

The Wisconsin mechanics' lien law will be found in *In re Cook and Gleason*, *ante*, 116.

J. M. Bingham, for mechanics.

Bartlett & Hayden, and *A. G. Safford*, for mortgagee.

HOPKINS, J.: The question now presented is, which has priority, the mortgagee or the mechanics?

The mechanics and material men claim that their liens take precedence of the mortgage, as well those growing out of contracts entered into *after* the giving of the mortgage as before; that in both cases their liens take effect by relation from the commencement of the building under the mechanics' lien law of this state (Taylor's Statutes, page 1762.) By the first section of that act it is provided that mechanics and others shall have a lien for work and materials used in the construction of any building, "before any other lien which originated subsequent to the commencement of the building."

The question depends upon the proper meaning of that clause. I do not find that it has been directly passed upon by the supreme court of this state.

In *Reese vs. Ludington*, 13 Wisconsin, 276, and *Jessup vs. Stone*, Id., 466, the question was whether a mortgage executed *prior* to the commencement of the building took precedence of mechanics' liens upon the building as well as the ground upon which it was situated, and the court held that the mechanics' liens were subordinate to the mortgage upon both the building and ground. In preparing the opinion it seems to have been assumed by the court that the liens attached as of the time of the commencement of the building, for the learned Chief Justice who wrote the opinion of the court, says: "If we are correct in these views, the design was to give the mechanic a lien from the commencement of the building," etc. But it was claimed, inasmuch as that point was not directly before the court, that it was not authoritatively decided. I have therefore examined the question as if not decided, and construed the act according to my understanding of it.

It is apparent to my mind that the legislature designed that

the claims of mechanics and others, for work and materials, should have preference to all liens created by the party after the commencement of the building; that such liens should relate back to the commencement of the building without reference to the time when the work was done or material furnished, provided such liens were filed and prosecuted as prescribed by the act. The statute, by declaring that such liens should be *before* any liens originating subsequent to the commencement of the building, impliedly fixed that time as the date of the lien. The provision will not admit of any other construction. The lien is a creature of the statute and has the force and effect given to it by the law of its creation.

What effect a suspension of work for some considerable length of time might have in any given case, it is unnecessary to consider, as in this case there is no claim that the work was not prosecuted without intermission; nor do I wish to be understood as deciding whether or not a great change in the plans of the building after giving a mortgage would change the rule of priority, as there are no facts before me now requiring such a decision. In the construction I have given to the act I have assumed the ordinary case of continuing the work without material interruption or alteration of plans, and have not considered what modifications should be made in other cases, if any.

In some of the states the statutes give a lien "from the commencement of the work," while in others they are like the statutes here, and as they have received an interpretation by the courts of those states, I am not without aid in construing our own.

In the case of the *American Fire Insurance Company vs. Pringle*, 2 Sergeant & Rawle, 138, the Supreme Court of Pennsylvania construed a like provision in the statutes of that state as giving to the mechanic a lien for work from the commencement of the building, and held such lien to be prior to the lien of a mortgage given after the commencement of a building, although the contracts for the work for which the liens were

claimed were made after the giving of the mortgage. That doctrine was afterwards approved and followed in *Pennock vs. Hoover*, 5 Rawle, 291; and in *Hern vs. Hopkins*, 13 Sergeant & Rawle, 269, it was applied to a judgment lien obtained during the construction of a building, which was held to be overreached by the relation of the mechanics' lien back to the commencement of the building.

In Maryland, the statute is like ours, and the court of chancery of that state, in *Wells vs. The Canton Company*, 3 Maryland, 234, hold that mechanics' liens attach from the commencement of the building, and have preference over all liens attaching subsequently.

In the state of Missouri there is also a mechanics' lien law for the city of St. Louis, like ours in respect to the clause now under consideration, and in *Dubois vs. Wilson*, 21 Missouri, 213, it is held that a lien of a mechanic for work and materials furnished under a contract with the owner overreached a mortgage placed upon the building after its commencement, although the work was done and materials furnished after the mortgage was executed. That court approved of and followed the case of *American Fire Insurance Company vs. Pringle*, *supra*.

The counsel representing the mortgagees in those cases urged upon the attention of the court the same constitutional objections to the law as are presented here, but they failed to influence the judgment of those courts. Nor do I appreciate the force or pertinency of such objections. The mortgagee is chargeable with a knowledge of the law, and he must be presumed to have known the fact that a building was in process of construction when he took his mortgage. He should, therefore, have protected himself against liens of mechanics and others by the terms of his contract. His want of proper caution in not doing so cannot prejudice the plain statutory rights of mechanics, nor can he successfully maintain that the act impairs the obligation of his contract by postponing his lien to theirs, which he must have known might be the case when he took his mortgage. Presumptively, property is enhanced in value

equal to the amount of the work and materials used in building upon it. It is true, as a general rule, that all improvements by a mortgagor inure to the benefit of the mortgagee without liability or expense to him, by increasing the value of his security. But the legislature have by this act modified that rule in the interest of labor, and postponed or subordinated the lien of a mortgage, and all liens created intermediate to the commencement and completion of a building, to the claims of mechanics for work and materials used in the building. I cannot see any constitutional objections to such an act. With the policy or propriety of the act courts have nothing to do. Those questions are for the legislature. But if it were otherwise, I cannot see any valid objection to the principle or equity of the statute. This disposes of the question of priority between the mechanics and mortgagee, and subordinates the mortgage to their liens.

The counsel for the mechanics discussed the question as to whether there should be any priority as between them. It seems to me that the view I have taken of the first question disposes substantially of this, for it follows logically from it that there can be no preference as between them. I have held that the mechanics' liens by relation date from the commencement of the building, not one but all. The circumstance of one commencing work first does not give any priority. They all stand on the same footing and are to be paid in full or *pro rata*, as the funds may suffice. Such is the express provision of the statute of New Jersey. But without any statute, such construction is the most just and equitable. The building is the result of the labor of the mason, carpenter, bricklayer, plasterer, glazier and painter. It is the joint product of the skill of the artisan and the means of the material man. Each contributed and each should share alike without preference. Some one of the various kinds of mechanics must commence first, but the accident of commencing does not give that one any superior equity.

There is a like statute in the states of California and Oregon,

and in both of these states it has been held that all liens arising under the act stand upon the same footing. All relate to the commencement of the building, and none have priority over the others.[1]

Logically these cases support as well the first proposition hereinbefore discussed, for they each hold that such liens by relation take effect from the commencement of the building. If so, they must necessarily overreach all subsequent mortgages or transfers. I do not find, nor was I referred by the learned counsel to any case holding a different doctrine.

In the state of Ohio, where the law gives a lien only "from the commencement of the work or furnishing materials," the Supreme Court, in a remarkably well considered case, *Choteau vs. Thompson*, 2 Ohio State, 114, hold that the act creates no priority as between the mechanics and material men; that, though they commenced work at different times, they were to be paid equally. The decision is based upon the manifest equity of the statute in view of the position in which each mechanic stands to the building.

The lien holders, or some of them, I understand, have taken judgment for the amount of their liens. I do not wish to be understood as expressing any opinion upon the validity of such judgments, or as sustaining the right of a party to proceed to judgment after bankruptcy proceedings are commenced. These matters are reserved until the debts or judgments are proved and properly before the court.

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[1] *Moxley vs. Shepard*, 3 California, 64; *Crowell vs. Gilman*, 18 do., 370; *Williamette Company vs. Riley*, 1 Oregon, 183.

In re MUNN.

DISTRICT COURT — NORTHERN DISTRICT OF ILLINOIS — JANUARY, 1873.

IN BANKRUPTCY.

1. NON-PAYMENT OF PAPER TO WHICH THERE IS A DEFENSE, NOT ACT OF BANKRUPTCY.—A man should not be adjudged bankrupt for non-payment of commercial paper if he has reasonable ground to believe that he is not liable upon it.

2. PARTIES SHOULD BE REMITTED TO ORDINARY REMEDIES.—If he can satisfy the court that he has good reason for disputing his liability, especially where he is in fact solvent, and has paid all other just claims, this court should not entertain jurisdiction, but should remit the parties to the ordinary remedies.

3. TRANSFER TO CO-PARTNER NOT ACT OF BANKRUPTCY.—A transfer of firm property from one member of a solvent firm to another is not an act of bankruptcy within section 39 of the act. Such a transfer is not a fraud upon the creditors of the firm, nor does it hinder or delay them, or constitute a preference contrary to the provisions of the act.

4. SECRET PARTNERS.—In order to charge a secret partner for the debts of the firm, it is necessary to show that such debts were contracted in the name and business of the firm, or that he had an interest in the contract or profits.

5. Where the purchaser of a note did not know that there were any secret partners with the persons whose names appeared upon its face and for whose individual benefit it was given, and placed the proceeds to the credit of the holder, the secret partners would not be liable.

6. The fact that such purchaser afterwards proved his claim in bankruptcy against the signers of the note alone tends to show that he understood them alone to be liable, and discounted it upon their responsibility.

7. Where firms composed of different members were doing business under the same firm name, circumstances stated under which dormant partners may not be liable.

This was a petition in bankruptcy filed by the Cook County National Bank of Chicago, against the firm of Munn & Scott, alleging that such firm was composed of Ira Y. Munn, George

L. Scott, George Armour, Albert A. Munger, Hiram Wheeler, Charles W. Wheeler, George H. Wheeler, James R. McKay, Perry H. Smith, and George L. Dunlap, and charging that those parties were indebted to the bank upon two notes of $5,000 each, executed by and in the name of Munn & Scott, one dated August 14, 1872, due in ninety days, payable to George R. Chittenden or order, the other bearing date on the 14th day of October, 1872, due in ninety days, payable to said bank, indorsed by Munn & Scott.

The petitioner charged as acts of bankruptcy:

1. That the firm of Munn & Scott being traders, etc., had stopped payment of their commercial paper, the notes described, and had not resumed within a period of fourteen days, nor up to the time of filing the petition.

2. That the firm of Munn & Scott, on the 23d day of September, 1872, transferred its property and effects to George Armour & Co., a firm alleged to be composed of all the parties constituting the firm of Munn & Scott, except Ira Y. Munn and George L. Scott, with intent to delay and hinder the creditors of the firm of Munn & Scott.

3. That the firm of Munn & Scott, on the 23d day of September, 1872, transferred to George Armour and others, for its use, all its property and assets to hinder and delay the creditors of Munn & Scott.

The prayer of the petition was that the firm of Munn & Scott, consisting of the parties named in the petition, might be adjudged bankrupts.

All the parties named, except Ira Y. Munn and George L. Scott, appeared and filed answers denying their liability upon the notes set up, denying that they executed the notes, or that they ever were members of the firm of "Munn & Scott" who executed the notes, and denying all the acts of bankruptcy stated in the petition.

Further facts are stated in the opinion.

George C. Campbell, for petitioning creditor.

John N. Jewett, *Wm. C. Goudy*, and *Wirt Dexter*, for respondents.

HOPKINS, J.: By the testimony introduced, it appears that Ira Y. Munn and George L. Scott, previous to the year 1864, owned and were interested in various elevators in this city, and were doing, under the name of Munn & Scott, the business of receiving, storing, and selling grain, and a general commission business. It also appears that a portion of the other parties were doing a like business under other names, and different from Munn & Scott; that in September, 1864, Munn & Scott, and the parties owning and doing business at the other elevators in this city, entered into a contract whereby they agreed to "stock the use of such elevators and to engage as partners" in receiving, storing, and shipping grain, and to divide the profits of such business according to certain terms, mentioned in the agreement. That agreement relates only to the business of "receiving, storing and shipping grain," including the keeping in repair of the elevators and machinery, and paying the expense of such repairs, and the rebuilding of the elevators in case of destruction.

The business was to be carried on under two names: that at the elevators known as the Northwestern, the Munn & Scott, the Union and the City, in the firm name of Munn & Scott, and at the elevators on the north side of the river, under the name of Munger, Wheeler & Co. Receipts for grain received at the elevators first named were to be issued in the name of Munn & Scott, and the others in the name of Munger, Wheeler & Co.; the earnings of all to be treated as belonging to one firm, or "pooled," as it was called, and after paying the expenses of transacting the business, divided as agreed between the parties. It appears that the business of receiving, storing and shipping grain was done in that way by the firm of Munn & Scott, until the 23d of September, 1872, some new parties having been introduced into the firm from time to time, so that at the time of the date of the notes first mentioned in the petition,

the parties named in the petition were members of and composed that firm. After the formation of the partnership to do the elevator business, Ira Y. Munn and George L. Scott continued to do business outside of the elevator business, and were engaged in buying and selling grain and produce, and in other speculations wholly distinct from the elevator business, and in which the parties composing the firm doing the business of receiving and storing grain at the elevators had no interest or connection whatever. It also appears that in 1865 or 1866, Munn & Scott entered into a partnership with other parties under the firm name of Munn, Norton & Scott, engaged in a general commission business. The firm of Munn & Scott, composed of Ira Y. Munn and George L. Scott alone, continued to do business until the bankruptcy proceedings were commenced against the firm of Munn, Norton & Scott, on or about the first of November last. It does not appear that it was known outside of its members who composed the firm doing the warehouse and elevator business, until after bankruptcy proceedings against Munn, Norton & Scott. A portion of the warehouse receipts were signed "Munn & Scott," and another portion "Munger, Wheeler & Co." There is no evidence that the public or the dealers with that firm knew that any other persons were interested in that business than the parties whose names appeared upon the receipts, or that the two firms were composed of the same persons. Mr. Munn swears he never gave a note for that firm in the elevator business, or a note that he meant or understood bound anybody but himself and Mr. Scott, and Mr. Armour, another member of the firm, says none were given by Munn & Scott, to his knowledge, except two, one being for supplies and the other for machinery to be used in and about the business. Nor does it appear that the elevator firm ever did any other business or was interested in any business except the receiving, storing and shipping of grain, as mentioned in the articles of copartnership. So far as the evidence produced goes, that company never incurred any liability in any other manner or form than by giving ware-

house receipts for grain stored in the elevators, except such as they incurred for freight on grain stored in the elevators, or for expenses incurred in conducting the business; while Munn & Scott, as a separate firm, were doing a business of buying and selling grain in the market, and in that way and business were using their firm and individual credit to quite a large extent, as was also the firm of Munn, Norton & Scott. Both of these firms were in good credit until the latter part of August last, when they became involved in a wheat "corner," which broke them up and rendered them insolvent.

These are the facts as established by the evidence in relation to the partnership of the respondents, and the business done by them as such partners. The evidence as to Perry H. Smith and Geo. L. Dunlap's connection with the firm is very slight, but in view of the course pursued upon the trial, it may, in the absence of any rebutting testimony, be considered sufficient. It is preferable, also, to dispose of the case upon its merits rather than upon a technical objection of that kind taken after the close of the trial. If the counsel for the petitioners had omitted to inquire of the parties as to Messrs. Smith and Dunlap's relation to the firm, under the impression that this had been proven, the court would have allowed him to do so even after the commencement of the argument in the case. From these facts it would seem that all the members of the elevator firm, except those whose names were used, were silent or dormant partners, and can only be held liable as such. On the face of these notes the only names are "Munn & Scott." The other respondents are strangers to the transaction. The contract of discount was made with Munn & Scott, and does not, *per se*, create any liability as to the others. The liability of a partner arises from pledging his name, if his name is introduced into the firm, thereby holding it out as a security to the community, or from receiving profits, if he be a silent partner. The principle upon which the liability of secret partners rests is essentially different from that of a known and open partner whose name appears in the business. A secret partner is liable

not because credit is supposed to have been given to the firm by reason of his connection with it, but because he is one of the contracting parties, and is benefited by the profits of the contract, so that in order to charge a secret partner for debts contracted in the name of the firm of which he is a dormant member, it is necessary to show that such debts were contracted in the name and business of the firm, or that he had an interest in the contract or profits.[1] The evidence in this case shows that although they had been in business for about eight years, no commercial paper had ever been given by the firm in the name of Munn & Scott, except the two notes before referred to. It would seem from this that the business did not require the use of credit in that way, and that it was not within the general scope of the business to give such paper, so that the liability of the contestants, if ostensible partners, might be a question of serious doubt.

In view of these questions, can it be pretended that the contestants are guilty of an act of bankruptcy in not paying these notes within fourteen days after maturity? Had they not reasonable grounds to believe they were not liable upon these notes? If they had, the non-payment for a period of fourteen days does not bring them within the spirit or meaning of the bankrupt act. They deny in good faith, we think, their liability upon these notes, and their non-payment, under such circumstances, should not be deemed an act of bankruptcy as against the contestants, especially as it is shown they are worth at least $1,500,000. It would not be sufficient to defeat the operation of the bankrupt act to simply deny liability upon the notes, but the party must satisfy the court that he has good reason for disputing his liability, and that his liability is involved in doubt. The existence of a valid note or claim is fundamental. Without that the bankrupt court cannot proceed; and when a party shows there is reasonable doubt upon that point,

[1] *Winship vs. Bank of the United States*, 5th Peters, 529; 1st Parsons on Contracts, 167; *Bank of Alexandria vs. Mandeville*, 1 Cranch, C. C. R., 575.

accompanied with evidence of a condition of solvency in fact, and of the payment of all other just claims and commercial paper, and shows that the non-payment complained of was simply because he did not owe the note or was not liable upon it, and also the further fact (which appears in this case,) that no demand had ever been made for the payment, a court of bankruptcy should not entertain jurisdiction, but should dismiss the petition and turn parties over to pursue the ordinary remedies provided in cases to collect debts of solvent parties. A different construction would make it necessary for parties engaged in trade to pay every note presented, or upon which it might be claimed they were liable, at the risk of being thrown into bankruptcy during the trial and investigation of the alleged liability, to the utter destruction of their credit. Such a construction would be subject to great abuse and would often lead to a perversion of the true objects and intents of the act. This construction has been generally given by the other courts to the provisions of the act under consideration. This court also has heretofore so construed it, and this case is not of such a character as to induce it to change its previously expressed opinion. There is no necessity for extending or straining the construction to protect the rights of the parties here, as these contestants are abundantly able to pay the claim of the petitioners if it should be declared that they are liable for it, and the idea of adjudging such men bankrupts is asking of the court a judgment founded upon altogether too technical a construction of the bankrupt act. The courts have real bankrupts enough to deal with without extending their examination to include suppositious or fictitious cases. The contestants having shown, therefore, a sufficient reason for not voluntarily paying the notes described before their liability should be judicially determined, the suspension of payment on them for fourteen days is not an act of bankruptcy within the meaning of the bankrupt act.

The question of the contestants' liability is not intended to be absolutely determined in this case. The view taken of the

bankrupt act renders that unnecessary. There was some evidence given tending to show that Chittenden, who procured the notes to be discounted by the petitioner, represented that the "elevator ring" were all bound, and that Mr. Munn so stated when the last note was given, and so Mr. Spencer, the president of the bank testifies. But Mr. Munn contradicts Spencer's testimony on that point. The evidence, therefore, as to what occurred between Mr. Munn and Mr. Spencer being balanced, and Mr. Chittenden not being called, we do not regard the fact as established. But if Mr. Spencer's account is correct, Mr. Chittenden did not disclose the names of the parties constituting the "ring," and there is no evidence that Mr. Spencer knew who they were. So conceding the facts to be as stated by Mr. Spencer, these parties, or a portion of them, were still silent partners; and as it appears that the proceeds of the notes did not go to the use of the firm of which they were members, and that they were not given for the benefit of that firm, nor in the business of that firm, it would not, in our opinion, materially change the question of the liability of such partners.

There are some additional circumstances calculated to excite a suspicion and raise a doubt as to the real business transacted by the elevator firm: Such as allowing Munn & Scott to keep the firm business in the same book in which they kept the other business of Munn & Scott; allowing the warehouse receipts to be signed in the name they used in their separate business. But they are not sufficient to authorize us to hold the other partners so clearly liable as to have required them to pay these notes without contest. We have considered these questions, but they have not impressed us as of sufficient importance to warrant us in holding that the respondents are liable so as to be proceeded against in bankruptcy for non-payment of these notes. It was very imprudent and hazardous on the part of the elevator firm to allow a portion of the business to be done under the circumstances in such a manner by Munn & Scott. It naturally provoked just such claims as this, which

they might have anticipated. The petitioners themselves could not have supposed these parties liable, we think, until quite lately, for they proved up their claim upon these notes as against Munn & Scott in the bankruptcy proceedings against Munn, Norton & Scott. If the president, Mr. Spencer, had understood that the persons proceeded against in this case were liable, why prove up the claim against Munn & Scott alone, who were insolvent? This conduct of the president, who now undertakes to establish the liability of these contestants, bears very directly upon the question as to who he understood at the time were liable, and has a direct tendency to show that when he discounted the notes he supposed Munn & Scott alone were liable upon them. The counsel for the petitioners claimed as having an important bearing upon the question of liability, the fact that these contestants, under the name of George Armour & Co., took up all of Munn & Scott's notes, which had as collateral the warehouse receipts of Munn & Scott. He argued that by so doing they admitted their liability. They did, undoubtedly, as to those receipts. They took up the receipts held as collateral to the notes of Munn, Norton & Scott, and it might as well be claimed that they admitted their liability upon those. By so doing they admitted their liability on the receipts, but they dispute their liability on the commercial paper of Munn & Scott, and we think they have cast such a doubt upon their liability thereon as to take the nonpayment of these notes out of the operation of the bankrupt act.

The other acts of bankruptcy are not proven as alleged. The allegation is that the firm of Munn & Scott, (meaning all the parties to this proceeding,) transferred its property and effects to the firm of George Armour & Co., another firm. The proof is that Ira Y. Munn and G. L. Scott transferred their interest in the elevators and other firm effects to George Armour for the use of the firm. It was a simple transfer, by two of the partners, of their interest in the firm property to the other partners. That does not support the allegation in

the petition, and we do not see how such a transfer could be maintained as within the meaning of the bankrupt act. We are not prepared to hold such a transfer to be a fraud upon the creditors of the firm, or as hindering or delaying the creditors of the firm, or as constituting any preference contrary to the provisions of the bankrupt act, particularly when the firm or the members composing the firm are *solvent*. From these views it follows that the petitioner has failed to prove the facts stated in the petition and the proceedings must be dismissed with costs.

BLODGETT, J., concurring.

That non-payment of commercial paper to which the maker has, or in good faith believes he has, a valid defense, is not an act of bankruptcy. *In re Hercules Mutual Life Assurance Co.*, 6 Bankruptcy Register, 338; *In re Thompson and McClellan*, Vol. 2 of this Series, p. 166, and cases there cited.

As to liability of secret partners, consult *Waugh vs. Carver*, 1 Smith's Leading Cases, and cases there cited; Parsons on Partnership, 61–67; *Bank of Alexander vs. Mandeville*, 1 Cranch C. C. R., 575; *Ex parte Warren*, Davies, 320; *Bigelow vs. Elliott*, 1 Clifford, 28; Story on Partnership, §§ 63, 373.

As to rights of creditors on transfer of firm property to one of the partners, consult also *Howe vs. Lawrence*, 9 Cushing, 553; *Ladd vs. Griswold*, 4 Gilman, 25; *Ketchum vs. Durkee*, 1 Barbour's Chancery R. 480.

As to such transfer by insolvent partners, see *In re Cook and Gleason*, *ante*, p. 122. [*Reporter*.

In re REPUBLIC INSURANCE COMPANY.

DISTRICT COURT — NORTHERN DISTRICT OF ILLINOIS — FEBRUARY, 1873.

IN BANKRUPTCY.

POWER OF BANKRUPT COURT TO ASSESS STOCKHOLDERS.

1. This court has jurisdiction and power to make a call and assessment against the stockholders in a bankrupt insurance company, on stock held by them, but not paid up. It has all the powers of a court of equity in the premises.

2. The company, while solvent, having bought and retired a portion of its capital stock, this court will not go behind such action of the constituted authorities of the company. Such an act was within their general scope and power, and does not relieve the other stockholders from their liability to calls after the company has been declared bankrupt.

3. CLAUSE IN CHARTER DOES NOT LIMIT POWER OF COURT.—Although the charter of the company gives no right to make a call on the unpaid stock, except in case "of losses exceeding the means of the corporation," this clause should not be construed as limiting the right of the company or court to an assessment for payment of losses only. When the funds are exhausted by losses an assessment may be made, either to pay debts already contracted or to create a new fund for a business basis. The losses exceeding the means of the company, the liability of the stockholder on his unpaid stock becomes fixed, and whether the balance is to be applied in payment of losses or in payment of other liabilities and expenses does not affect the question.

4. This court also has power to make an assessment to return unearned premiums, and all claims properly provable against the company, and and also the expense of closing up its affairs.

5. EQUALIZATION OF PAYMENTS.—The court also has jurisdiction of the equalization of payments between stockholders; and where part have paid more than their fair proportion, it can assess the others and adjust the account between them.

6. It can also, where equity requires it, allow interest on claims proven.

This was an application by Joseph R. Payson, the assignee of the Republic Insurance Company of Chicago, bankrupt,

for an order of court directing an assessment upon the stock holders of said company, for such a per-centage of the unpaid capital yet standing subject to call as should, in the judgment of the court, be necessary to liquidate the known liabilities of the bankrupt.

The petition was filed on the 20th day of December, 1872, and an order then entered that all stockholders should show cause on or before the 20th day of January, 1873, why the assessment asked for should not be made, and that a copy of such order should be forwarded by mail to the address of each stockholder, as shown by the books of said company, and also that said order should be published in certain designated newspapers. On the return day of this rule an extension thereof was given to the 28th day of January, and on the day last named several stockholders having appeared by counsel and objected, for various reasons assigned, to the making of such assessment, and denied the facts set forth in the petition, a reference was made by the court to H. N. Hibbard, Esq., the register in bankruptcy of this court, to take proof upon the following matters of fact raised by said petition and answers:

First—The total amount of liabilities of the company.

Second—The amount of available assets, exclusive of the unpaid capital stock.

Third—The amount of unpaid capital stock.

The register having returned into court the proof taken by him in pursuance of this order, the matter was set down for hearing, and argument had upon the various questions raised by the petition, answers, and proof.

The facts further appear in the opinion.

Tenneys, Flower & Abercrombie, for assignee.

McCagg, Fuller & Culver, Paddock & Ide, and other counsel, for stockholders.

BLODGETT, J.: The substantial facts in the case appear to be that said bankrupt insurance company was a duly organized

corporation, by virtue of a special act of incorporation passed by the legislature of Illinois, approved February 18, 1865, and an act amendatory thereof, approved March 25, 1869; that the capital stock of said bankrupt was limited only by the discretion of its board of directors; that said board fixed said capital stock first at $1,000,000, and subsequently increased the same to $5,000,000, and subsequently to $7,500,000, but at no time in the history of the company did its subscribed capital stock amount to quite $5,000,000; that the capital stock of said company is divided into shares of $100 each, and that a large portion of its stockholders reside outside of this state and district; that by the terms of subscription, made in accordance with the charter, twenty per cent. of said capital stock was to be paid when the subscription was made, and the remaining eighty per cent. was to be assessed only in the event of the twenty per cent. cash fund becoming impaired by losses.

The charter also provides that "The real and personal property of each individual stockholder shall be held liable for any and all losses and liabilities of the company, to the amount of the stock subscribed or held by him and not actually paid in. *In all cases of losses exceeding the means of the corporation each stockholder shall be liable to the amount of the unpaid stock held by him.*" And the same provision is substantially incorporated into each stock certificate issued by said company.

By the fire in the city of Chicago on the memorable 9th of October, 1871, said company sustained losses upon fire policies it had issued to the amount of about $3,250,000, and the cash fund available for the payment of said losses amounted to only $955,000. At that time the capital stock of said bankrupt then outstanding was $4,773,400, on which twenty per cent. had been paid and eighty per cent. remained unpaid and subject to call, in pursuance to the charter and subscription contract I have quoted.

On the 3d of November, 1871, the executive committee of said company made an assessment and call of eighty per centum upon their stock, which action of the committee was

ratified and approved by the directors of said company, at their regular annual meeting held on the 17th of January, 1872, but with the proviso that in case any stockholder should pay forty per cent. of such call by the 15th of March then next, the balance should not be enforced until the further action of the executive committee; and on the 17th day of July, 1872, the executive committee made an absolute and unconditional call and assessment of sixty per cent. on each stockholder, to be paid by the first day of August, 1872. In pursuance of this action of the executive committee and board of directors many of the stockholders have paid various sums upon their stock, some having paid the full eighty per cent. remaining unpaid at the time the first call was made; and the funds thus raised, together with those on hand at the time of the fire, have been applied to the payment of the losses and expenses of the company, with the exception of about $50,000 now on hand; and there are still unpaid losses to the amount of $786,338.62, and other liabilities to the amount of $250,000 or upwards. It also appears from the proof that after the losses aforesaid the company suspended all business except such as pertained to the winding up of its affairs; that it adjusted the losses sustained, and paid twenty-five per cent. in cash soon after such adjustment, and gave certificates of indebtedness for the balance, payable one-third the first day of April, one-third the first day of August, and one-third the first day of December, 1872. It also appears that at some time soon after the great fire, and while the policy of the company as to the liquidation of its liabilities was yet unsettled, a portion of its creditors accepted a payment of twenty-five per cent. on the amount of their claims for losses, and gave releases in full; but when the company afterward resolved to assess its stockholders and pay in full, these releases were surrendered and those creditors received certificates to the full amount of their adjusted losses less the twenty-five per cent. paid; that some of its stockholders also held policies on which they sustained losses, and that their claims for losses were applied directly to the payment of the

call on their stock. And it further appears that, by a resolution of the executive committee, stockholders were allowed to pay their calls in certificates of indebtedness issued by the company on its losses, thereby wholly retiring the certificates so paid in. Many of the stockholders, it also appears, are married women, infants, insolvents, and persons who have gone out of the country, so that their subscriptions are unavailable, it being reliably estimated that at least fifteen per cent. of the unpaid stock is in that condition. There are also still outstanding policies issued by the company which it will cost at least $50,000 to cancel by payment of the unearned premiums, and it is urged by the assignee that the payments made by the stockholders should be equalized, so that those who have paid more than their *pro rata* required to pay the debts of the bankrupt and expenses of administration, should have the excess refunded to them. The assignee also suggests that the certificates of indebtedness, although not bearing interest upon their face, yet, by operation of law, draw interest after maturity till the adjudication of bankruptcy, and that provision should be made for this item, at least, if not for interest until payment is made.

In view of the facts thus shown, the assignee asks that a call and assessment of sixty dollars be made on each share of the capital stock of said bankrupt company, upon which call shall be credited to each stockholder such payments as he has made on his stock, in excess of the original twenty per cent. paid at the time of subscription.

The objections urged in behalf of the stockholders, who have appeared to show cause against the rule, may be summarized as follows:

First—This court has no jurisdiction to make the call and assessment asked.

Second—Some of said stockholders insist that said company has fraudulently retired a portion of its capital stock, without the consent of all the other stockholders, and they are thereby relieved; and others contend that the company, since they sub-

scribed for their stock, has increased the amount of its capital stock and otherwise changed its business and financial policy, whereby they are discharged.

Third—That the assessment called for is unnecessarily large to meet the liabilities of the bankrupt; that assessment can only be made to pay *losses*, and no assessment can be made to pay unearned premiums for the purpose of cancelling policies, or to pay the expenses of administration and closing the affairs of the estate; that the court has no power to adjust equities between stockholders, and cannot, therefore, apply assessments to reimburse those who have paid more than their *pro rata*, such being the peculiar province of a court of equity, and that the court should not assess to pay interest.

As to the first objection, it will be sufficient to say that this court is, by the bankrupt law, clothed with all the powers of a court of equity, and the power of a court of equity to call in the unpaid stock of an insolvent corporation for the purpose of paying its debts has been so frequently asserted and exercised in late years, as to leave the question of its power in that regard no longer in doubt.[1]

As to the second point—that the company has fraudulently retired a portion of its stock, to the prejudice of its stockholders—it is based mainly upon these facts, as shown in the proof: Some time in the latter part of the year 1870, the directors of the company concluded to withdraw its business agencies from the city of New York, and perhaps some other points in the Eastern states, and extend its business correspondingly in the West and Northwest, and in order to prevent dissatisfaction among stockholders in the places from which the business of the company was so withdrawn, it was deemed best to purchase the stock held there, if it could be done at not over twenty per cent., with the intention of reissuing said stock in the new localities where agencies or branches were

[1] *Ogilvie vs. Knox County Insurance Company*, 22 Howard, 381; *Winans vs. McKean Railroad and Navigation Company*, 6 Blatchford, 215.

established; and in pursuance of this resolution about $217,000 of stock was so purchased in at from fifteen to seventeen cents on the dollar, and at the annual meeting in January, 1871, $200,000 of this stock, not having been reissued, was, for the purpose of showing no reduction of outstanding capital during the year, placed in the name of the treasurer of the company upon the books, but with the express understanding that he held it in trust for the company, who had the right to cancel it, if deemed expedient to do so by the board.

This they subsequently did, thereby reducing the outstanding stock on the books to the amount actually held by the stockholders.

To my mind it seems a sufficient answer to this objection, that all this action took place while the company was in a solvent condition, and that this court will not, in this proceeding, go behind the action of the constituted authorities of the company while in full control of its affairs, and attempt to rectify any errors of judgment or even frauds then perpetrated. The board of directors or officers of the company may have exceeded the powers in many particulars, which it is too late now to inquire into. It is evident that this stock, while it stood in the name of the treasurer in trust for the company, was not understood between the parties to the transaction—that is, the board and the treasurer—as assessable stock. He only held it, nominally, for the company, and any attempt to assess that stock now, would lead to costly litigation and delay. There was nothing upon the books of the company, at the time this court took jurisdiction of it, to show there is any present liability on this stock.

But it is not necessary that the court should now pass upon the validity of the stock thus placed in the name of its officer and afterwards retired or cancelled. It is sufficient to say for the present, that it does not appear to be now available for the purpose of raising funds to meet the debts of the bankrupt. In some future proceeding it may become necessary to go more thoroughly into an examination of the question raised by

this proof. The principle is fully settled by the authorities, that no fraud or misconduct by the managers of a corporation can be set up by stockholders to defeat their liability to creditors on unpaid stock.[1]

The third objection questions the extent of the assessment asked and the power of the court to make an assessment, except for losses. But I am clearly of the opinion that the proof shows a necessity for an assessment to the full amount asked by the petition. The losses yet unpaid, for which certificates have been issued, amout to nearly $800,000, and there are still outstanding policies on which losses may yet be sustained. At the time of the great fire of October, 1871, the company had nearly $1,000,000 in available funds which it had the right to apply to the payment of any debt or claim against the company. This fund has been exhausted by applying it to the payment of losses, and although the right to make a call and assessment on the unpaid eighty per cent. does not arise, under the charter, except in case of "*losses exceeding the means of the corporation*," yet I do not construe that clause as limiting the right of the company or court to make an assessment for the payment of *losses* only; when the funds are exhausted by losses, and an assessment becomes necessary, it may be made for all purposes, either to pay debts already contracted, or to create a new fund for the purpose of a business basis. In this case the losses far exceeded the means of the company, and the liability of the stockholder for the amount of the unpaid stock held by him is fixed. The contingency has happened which the charter provided should make him liable on his unpaid stock; and whether it is to be applied in payment of losses, or a part in payment of other liabilities and expenses of the company, does not affect the question.

I cannot indorse the limited and narrow construction attempted to be put upon the liability of these stockholders.

[1] *Ogilvie vs. Knox County Insurance Company*, 22 Howard, 381.

True, an assessment does not seem to have been contemplated until the funds were exhausted by losses, but that does not, either in spirit or in letter, restrict the company or court to the payment of losses only, out of the funds called in by assessments on the unpaid stock.

In regard to the payment of the unearned premiums to cancel policies yet unexpired. The company is still liable on those policies, and every dictate of caution and sound business prudence requires that liability to be terminated, which can only be done by return of the unearned premiums, and I have no doubt of the power of the court to assess for that purpose. The same may be said of the expenses of closing the affairs of the company. This is incident to the administration of the law, and the item is undoubtedly one to be provided for out of the unpaid stock.

As to the equalization of payments between stockholders, this court has jurisdiction of the entire matter. Not only the corporation, but its entire constituency is before the court, and full justice can be done not only to creditors but between stockholders. And if, as the proof shows in this case, part of those stockholders have paid more than their fair proportion, the others who have not paid can be compelled to pay enough to adjust the account between stockholders. This court, having all the powers of a court of equity in the premises, can compel each stockholder to pay what in equity and good conscience he ought to pay, and distribute the proceeds of such payment among those entitled to receive it, whether creditors or stockholders, who have paid more than their ratable share. It is urged that the stockholders who have paid in full have released the company from all claim for contribution, and this appears to be true, as the proof now stands, as to a part of this class of stockholders; but others of this class have not waived their right to contribution, and this is not the time to pass upon the force and effect of such waiver or release. The individual stockholder who has given such release has a right to be heard before a decision is made against him on this point. As to the

item estimated for interest, some interest has accrued, and I understand it to be in the power and discretion of the court to allow interest on claims proven, under circumstances where equity requires it. But even if the amount estimated for this item is not all required for that purpose, there is still a large contingent liability for losses on policies yet in force, and for expenses of collecting the assessment now asked, which convinces me that the funds to be realized from the assessment proposed will not, by any probability, be in excess of the demand upon it, and that to save the expense and delay of another assessment, this should be made ample to meet all probable requirements.

It is not my purpose to decide, on this occasion, who are stockholders, nor the amount for which they may be respectively liable, as those questions will more regularly come up in suits at law brought by the assignee to enforce payment of the assessment. But what I do intend to decide and determine is, that the court has power to make the assessment required for the payment of all claims properly provable in bankruptcy against the bankrupt, and the expenses of collecting such assessment and of the bankrupt proceedings; and also that the amount of assessment asked for by the assignee is, in my opinion, under the proof, no more than adequate to meet the debts and liabilities of the bankrupt.

An assessment of sixty per cent., as prayed for, will be ordered.

In re FIREMEN'S INSURANCE COMPANY.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—FEBRUARY, 1873.

IN BANKRUPTCY

RIGHTS OF POLICY HOLDERS.

1. The terms and conditions of an insurance policy remain binding upon the insured after adjudication of bankruptcy to the same extent as before. The policy holder is bound by the terms of his contract.

2. ASSIGNEE CANNOT WAIVE CONDITIONS.—Though an insurance company may, while solvent, waive the performance of conditions the assignee has no such power.

3. SHOULD EXAMINE PROOFS.—Even where proofs have been furnished and losses adjusted before adjudication, it is the right and duty of the assignee to examine and revise such proofs and adjustment, and to call for further proof if the claim is not clearly made out, or there is any evidence of lack of entire good faith.

4. YEAR CLAUSE—EFFECT OF PROOF OF DEBT.—A clause in a policy limiting the right of action to one year from the loss is valid as a limitation, but proof of the debt in bankruptcy is equivalent to the commencement of a suit. Failure or neglect to make such proof, or bring suit, however, within the time limited, bars the claim as effectually as failure to sue if the company were solvent.

5. ADJUSTMENT.—If the loss has been adjusted before the filing of the petition in bankruptcy, such adjustment is a settlement and a waiver of the limitation clause.

6. After such adjustment in good faith, the claim can be proven without regard to the limitation clause in the policy.

7. If, however, the proof was not submitted until after petition filed, the assignee cannot make an adjustment or agreement upon which an action can be maintained.

8. EFFECT OF WAIVER BY COMPANY.—A company while solvent may waive the proofs required by the policy, and where there is clear evidence of such waiver shown in the proof of debt in bankruptcy the debt should be allowed, subject to the right of the assignee to make inquiry into all the facts touching such alleged waiver.

9. If the assured shows such waiver regularly made in good faith by

the company while it had the right so to do, the assignee should allow the claim, otherwise not.

10. CONTESTED CLAIM—PRACTICE.—The proper practice where the assignee wishes to contest any claim of the above classes is to ask that the claim be expunged under the 34th rule in bankruptcy.

Opinion on certificate from Register.

The facts are stated in the opinion.

Tenneys, Flower & Abercrombie, and *Geo. W. Smith*, for creditors.

Hoyne, Horton & Hoyne, for assignee.

BLODGETT, J.: Several questions of importance in the settlement of the affairs of this company, as well as other bankrupt insurance companies now in this court, have been certified up from the register for the opinion and direction of the court. The policies issued by the Firemen's Insurance Company contain the following clauses:

"NINTH—Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and as soon thereafter as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property—giving copies of the written portion of all policies thereon; also the actual cash value of the property and their interests therein; for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the same time of the loss; when and how the fire originated; and shall also produce a certificate, under the hand and seal of a magistrate or notary public nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured, stating that he has examined the circumstances attending the loss; knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the property insured to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company, and subscribe to such examinations when reduced to writing, and shall also produce their books of account and other vouchers, and exhibit the same for examination at the office of the company, and permit extracts and copies thereof to be made. The

assured shall also produce certified copies of all bills and invoices, the invoices of which have been lost, and shall exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination, to any person or persons named by the company.

"TWELFTH—It is furthermore hereby expressly provided and mutually agreed, that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within twelve months next after the loss shall occur, and, should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claims, any statute of limitation to the contrary notwithstanding."

These clauses, with some slight modifications of phraseology, have been inserted for many years past in nearly all policies issued by fire insurance companies, and their binding effect as essential parts of the contract has been frequently sustained by the courts.

The ninth clause imposes a condition precedent to be performed by the assured before any right of action accrues under the policy. It is true the company may waive the performance of this condition, and many cases are found in the books where the courts have decided what acts amounted to a waiver in those cases, but the principle is well established that, unless waived by the company, the notice and proofs of loss must be furnished by the assured, as a prerequisite to his right of action on the policy.[1] The questions now submitted to the court are as follows:

1. Ought the assignee to allow and pay a claim for a loss arising under a policy where no proof of loss, as required by the ninth clause, has been submitted to the company or

[1] *Mason vs. Harvey*, 8 Welsby, Hurlstone & Gordon, 819; *Wellcome vs. People's Equitable Insurance Company*, 2 Gray, 480; *Spring Garden Mutual Insurance Company vs. Evans*, 9 Maryland, 1; *Boyle vs. Insurance Co.*, 7 Jones Law, (N. C.) 373; *Smith vs. Haverill Mutual Fire Insurance Company*, 1 Allen, 297; *Desilver vs. Insurance Co.*, 38 Pennsylvania State, 130; 2 Greenleaf on Evidence, § 406, and notes.

assignee, nor any proof of debt made in the proceedings in bankruptcy, nor suit commenced, within twelve months after the loss occurred?

2. Ought the assignee to allow and pay a claim for a loss arising under a policy where the assured has furnished either to the company before adjudication, or to the assignee afterwards, the proofs of loss required by the ninth clause of the policy, but has not proved his claim in bankruptcy nor commenced suit within twelve months?

3. Ought the assignee to pay such claim where no proofs of loss have been furnished either to the company or assignee, but the assured has proved a claim in bankruptcy in the ordinary form prescribed by the rules within twelve months after the loss occurred?

There can be no doubt that the terms and conditions of the policy remain binding upon the assured to the same extent whether the company is adjudicated bankrupt or remains solvent; in other words, the policy holder must recover, if at all, by the terms of his contract.

The ninth clause was undoubtedly adopted by the insurance companies for the purpose of compelling the assured to furnish the company with all the facts and details in regard to the nature and extent of the loss sustained, and a full disclosure of all the circumstances affecting the right to indemnity; and the assignee in bankruptcy, who must be supposed to be an entire stranger to the transaction up to the time of his appointment, must certainly need the information called for by this clause much more than the company, who, through its agents and officers, placed the risk. They may be presumed to know something about the nature of the risk and probable loss under it, but no such knowledge can be presumed against the assignee. It is the duty of the assured to furnish such proof as the terms of his policy require, and bring himself within the terms of his contract. As I said before, the company, by its officers, can waive this proof, but I am very clear that an assignee can make no such waiver. His duty requires him to

allow and pay no claim for losses unless the assured first furnishes all the proofs and submits, on request, to the examination provided for. As an officer of the court, he can allow no claim or debt upon his own information or knowledge, and can waive the performance of no condition which the assured is bound to perform in order to vitalize his demand. Even where proofs have been furnished, and losses adjusted before adjudication, especially if such adjustment was made after the intervention of actual insolvency, as is the case in most of the companies before this court, it would undoubtedly be the right and duty of the assignee to examine and revise such proofs and adjustments, and call for further proof if the claim was not clearly made out, or there was any evidence of the lack of entire good faith in the adjustment.

The twelfth clause, commonly spoken of as the "year clause," has been so frequently held valid by the courts as a limitation of the right of action by contract as hardly to require authorities.[1] As no suit can be maintained against the bankrupt after adjudication, except such as may be prosecuted by leave of the bankrupt court, proof of debt in bankruptcy must be deemed equivalent to the commencement of a suit, within the spirit and meaning of the twelfth clause, and if the company is in bankruptcy, a failure to make such proof, or bring a suit, within twelve months from the time loss accrued, bars the claim as effectually as would failure to sue if the company were not in bankruptcy.

I do not intend now to determine the effect of bringing suit against the company after adjudication as a saving act against the limitation of the twelfth clause, as such cases are probably not numerous, and may rest on facts peculiar to themselves.

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[1] *Fullam vs. New York Union Insurance Company*, 7 Gray, 61; *Brown vs. Roger Williams Insurance Company*, 5 Rhode Island, 394; *Brown vs. Hartford Fire Insurance Company*, Ib.; *Brown vs. Savannah Mutual Insurance Co.*, 24 Georgia, 97; *Northwestern Insurance Company vs. Phœnix Oil and Candle Factory*, 31 Pennsylvania State, 448.

From what I have already said, it is clear that a negative answer must be given to the first question.

As to the second proposition, where proofs of loss have been furnished either before adjudication to the company, or afterward to the assignee, but no proof of the claim made in bankruptcy, it seems to me that if the assured has furnished his proof of loss, and his loss has been adjusted, the amount determined and agreed upon before the petition in bankruptcy is filed, and while the company is acting through its officers, a suit may afterwards be maintained upon such adjustment for a balance struck on settlement. The parties have agreed upon the amount due under the policy while they were both competent to make such agreement, and a suit may be maintained on such agreement at any time within the statutory limitation. And I am of opinion that if the loss had been duly and regularly adjusted in good faith, before the company was adjudicated a bankrupt, the claim can be proven like any other debt, without regard to the year clause of the policy. But if the proofs of debt were not submitted or acted upon until after the petition was filed in bankruptcy, I think that, while the assignee may examine and pass upon such proofs for certain purposes, he cannot make an adjustment or agreement to pay, upon which an action could be maintained, and the assured, in order to preserve his claim, must not only present his proofs under the ninth clause, but must also make his proof in bankruptcy, as the substitute or equivalent for the commencement of a suit within twelve months under the twelfth clause. The principle on which I hold that an adjustment of the loss by the company is a waiver of the year clause, is, that the law will imply a promise by the company to pay the sum at which the loss is adjusted as a new contract arising out of the old one; but this principle does not apply to the assignee, as he has no right to make an express promise of that kind, and the law will not imply one against him from what he may do. I therefore think that when the assured has furnished his proofs of loss to the assignee, but has failed to follow them up by

proofs of his claim in bankruptcy, within twelve months from the time of loss, his claim is barred by the year clause.

As to the third proposition, where no proofs of loss have been furnished to the company or assignee, but the assured has proved up his loss as a debt against the estate in bankruptcy, under the rule of the bankrupt court. This case is similar in principle to the bringing of a suit against the company for loss on a policy without compliance with the ninth clause.

As I have said before, a company while in control of its affairs may waive the proofs required by the ninth clause, and cannot afterwards insist upon such proof as a condition precedent to bringing a suit; and in cases where there is clear evidence of a waiver of the preliminary proof shown in the proof of debt, I think the debt should be allowed, subject to the right of the assignee to have inquiry made into all the facts touching such alleged waiver; or, to illustrate my meaning, if suit is brought on a policy, the plaintiff must aver and prove that he has given notice and proof of loss as required by the ninth clause, or aver and prove a waiver of such notice and proofs. When he substitutes proof of a claim in bankruptcy for such suit, he must show either compliance with the ninth clause or a waiver of it; and if the waiver is aptly alleged, and stands the ordeal of investigation as to whether it was regularly made in good faith, the assignee should pay the policy. But if there is no evidence of waiver by the company while it had the right to make such waiver, it appears very clear to me that the assignee has no right to pay the claim unless the assured shows that he has complied with the prerequisites of the ninth clause, and the allegations of the assured in that regard may be inquired into by the assignee, and if it appears that the proofs of loss have not been duly furnished, or waived, he should not pay the claim.

The proper practice in cases where the assignee wishes to contest any claim of the nature referred to under either of the foregoing propositions, is to ask that the claim be expunged under the thirty-fourth rule of the general orders in bankruptcy, and proceed as in that rule directed.

NUSBAUM vs. EMERY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—FEBRUARY, 1873.

1. DISTILLER CANNOT RECOVER MONEY DEPOSITED FOR PATENT METERS.—A distiller cannot recover from the collector money which he had deposited with him to pay for the patented meters for his distillery prescribed by the internal revenue department.

2. DUTY OF COLLECTOR.—Upon receipt of meters he should transmit the deposits to the patentee; and he is not liable to the distiller. He is a mere stakeholder.

3. PRESUMPTION THAT REGULATIONS WERE FOLLOWED.—Where a plea does not distinctly either allege or deny that the regulations were followed, the court, on general demurrer, will presume that they were.

4. PATENTED METERS—MAY BE PRESCRIBED.—Congress has the right to compel distillers to affix certain meters to their stills as a condition precedent to carrying on their business, whether such meters are patented or not.

5. DISTILLER—WHEN ESTOPPED.—The Government having prescribed the terms upon which a person can engage in the business of distilling, a person having accepted those terms and entered upon the business cannot afterwards question their binding force.

This was an action of assumpsit as for money had and received, brought by Adolphus and Simon Nusbaum, distillers at Peoria, against Enoch Emery, the United States collector for that district, to recover the sum of $1,500 deposited with him to pay for certain Tice meters to be used in their distillery.

Defendant pleaded, in substance, that the said sum was not had and received by him as the money of plaintiffs, but as the money of one Isaac P. Tice; that on the first day of June, 1869, plaintiffs were distillers at Peoria, in said district, and holding a license as such distillers according to the rules and regulations prescribed by the commissioner of internal revenue of the United States; that theretofore said commissioner had, by

certain rules, adopted and prescribed for use by all distillers of the United States, certain spirit meters manufactured at the city of New York by the said Isaac P. Tice, he being the only manufacturer thereof; which rules and regulations in substance required that all distillers should make application in writing to the collector of internal revenue of the collection district within which their distilleries were situate, for said Tice meters, and should deposit with such collector the price of such meter by a certificate of deposit, to be forwarded to said Tice, when Tice should ship the meter at the city of New York, by a good and responsible company of common carriers, to the distiller applying therefor, and should forward bills of lading to the said collector; that the plaintiffs being such distillers, on the day and year aforesaid made their application in writing for certain spirit meters to said defendant, who was then collector of internal revenue for the district in which said distillery was situate, and deposited with the defendant the said money in said declaration mentioned, to pay the purchase price of said meters according to said rules and regulations; that said application for said meters was duly forwarded to said Tice, who shipped said meters by responsible carriers to plaintiffs at Peoria as required by said application, and forwarded the bills of lading, and that said meters were afterward duly received by said plaintiffs at Peoria. Wherefore defendant saith that said money so had and received by him became and was the money of said Isaac P. Tice, and not the money of said plaintiffs.

To this plea plaintiffs filed a general demurrer.

Ingersoll & McCune, for plaintiffs.

J. R. Doolittle, for defendant.

Blodgett, J.: By the third section of the act of July 20, 1868,[1] it is provided that whenever the commissioner of in-

[1] 15 U. S. Statutes at Large, 125.

ternal revenue shall adopt and prescribe for use in distilleries any meter, every owner, agent, or superintendent of a distillery, must furnish and attach at his own expense such meter for use in his distillery.

On the 16th of September, 1868, the commissioner of internal revenue adopted and prescribed for use in distilleries the spirit meter, invented by Isaac P. Tice, which it appears had also been adopted and prescribed by the secretary of the treasury on the 19th day of April, 1867, under section fifteen of the act of March 2, 1867,[1] and was subsequently recommended by the commissioners appointed by joint resolution of Congress, approved February 3, 1868.[2]

By certain rules and regulations adopted by the commissioner of internal revenue at the time of adopting said meter, the commissioner notified all distillers of the fact that the meter so adopted had been patented to Mr. Tice, and that he alone had the right to make and sell the same, but that by an agreement between the commissioner of internal revenue and Mr. Tice the price at which said meters should be sold had been fixed by a committee of three skillful and practical mechanics, two of whom had been selected by the commissioner and one by Mr. Tice. The regulations then provided that in order to obtain such meters, distillers should make application to Mr. Tice through the collector of the district where the distillery was situate, and at the time of making application should furnish to the collector a certificate of deposit in a United States depository, payable to the order of Mr. Tice, for the amount of the price of the meter or meters so applied for. The collector was to certify upon the application that he had received such certificate, and forward the application to the office of the commissioner of internal revenue for transmission to Mr. Tice.

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[1] 14 U. S. Statutes at Large, 481.

[2] 15 U. S. Statutes at Large, 246.

In his application the distiller was also required to state the means of access to his distillery, whether by railroad, steamboat, or canal, and with what points the distillery was connected by either of these modes of conveyance, and upon the delivery of the meter to the distiller the collector should at once transmit the certificate of deposit to Mr. Tice.

It will be seen that the plea sets up a substantial and almost literal compliance with the statute and regulations under it, and the demurrer admits the facts alleged in the plea.

The act of Congress authorized the commissioner of internal revenue to adopt a meter for use in all distilleries. By the order of September 16, 1868, the Tice meter was so adopted. The plaintiffs were distillers; their distillery was situate in Peoria, in this state. Defendant was collector of internal revenue for said district. Plaintiffs applied for certain meters, pursuant to the rules and regulations in that regard, and deposited the purchase price (the plea says by money or certificate of deposit, but the court must presume upon a general demurrer that the price was deposited with the collector by certificate of deposit, made payable to Tice, because such was the requirement of the rules.) The meters were ordered, were shipped by Tice, and received by plaintiffs.

It then became the defendant's duty to transmit the certificate of deposit to Tice.

I do not see how it can be claimed that defendant has ever received any money to plaintiffs' use. The certificate of deposit was not money, and defendant could not convert it into money except by forging the indorsement of Tice to the certificate, and that would not make the money he might thus obtain upon it the money of plaintiffs.

And even if it should be held that defendant disregarded the letter of the rules, and received from plaintiffs the money required to pay Tice for the meters ordered, instead of the certificate of deposit, still the moment Tice complied with the requisition and forwarded the meters to plaintiffs the money became the money of Tice, and defendant was liable to him for it.

This court has no doubt of the right of Congress to compel distillers to affix certain meters to their stills as a condition precedent to the right to carry on the business of distillers. And if the meter adopted is the subject of a patent, the distiller may be compelled to purchase of the patentee, or what is equivalent to that, because it rests with the patentee only to say whether he will monopolize the manufacture of his patented article or allow others to manufacture on terms.

We can see no principle of law which would prevent the commissioner of internal revenue from adopting for use a certain meter because it was patented. In this case the Government took the precaution to protect the distillers by limiting the price to a rate fixed by an impartial committee, and this, it seems to me, was all it was bound to do.

The power of the Government to prescribe the use of certain meters or locks or other devices whereby it can exercise a proper surveillance over the business of distillers is incident to the power to raise a revenue by a tax on manufactured products. And when the Government by its proper officers has prescribed the terms upon which a person can be allowed to engage in the business of distilling, and any person has accepted those terms and entered upon the business, it seems to me he ought not to be allowed to question their binding force upon him afterward.

He elected to carry on the business on the terms imposed, and should not be heard afterward to deny that those terms are binding on him.

The defendant in this case is only a mere stakeholder, even admitting that he ever had the money. And when the event has transpired which transferred the title to the money to Tice, the defendant no longer holds it for plaintiffs.

His duty as a public officer requires him to transmit the certificate, or money if money is deposited with him, to Tice, and it is not right that he should be sued for money which plaintiffs have no right to demand of him.

Demurrer overruled.

PORTSMOUTH SAVINGS BANK vs. TOWN OF YELLOW HEAD.

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — FEBRUARY, 1873.

MUNICIPAL BONDS.

1. ESTOPPEL.—As against a *bona fide* holder of bonds bearing upon their face the recital that they were issued according to law, it is not a sufficient defense that certain conditions have not been complied with. The town is estopped by the recitals.

2. RESCISSION OF AUTHORITY.—Nor is it a valid defense that after a meeting of the town electors at which a donation was authorized, but before it was formally accepted by the railroad company, the action of the first meeting was rescinded by the town.

3. RATIFICATION BY LEGISLATURE.—It is competent for the Legislature to ratify and confirm issues of bonds previously made, and, *it seems*, to authorize town authorities to issue bonds without a vote of the people.

Assumpsit on thirty-six coupons issued by the town of Yellow Head, Kankakee county, Illinois, to aid in the construction of the Chicago, Danville and Vincennes Railroad, a corporation organized under a special charter granted by the Legislature of Illinois. Private Laws of 1865, Vol. 2, p. 140.

The declaration contained simply the common counts for money lent and advanced, goods sold and delivered, etc., but upon the back of the declaration was indorsed notice that the plaintiff's sole and only claim under the declaration would be made on thirty-six coupons or interest warrants, numbered from one to thirty-six, inclusive, of which the following is a copy:

Yellow Head Township. Railroad Bond. $50. No. (1 to 36.) Interest Warrant. On the first day of March, 1872, the township of Yellow Head, Kankakee county, state of Illinois, will pay to the bearer *fifty dollars*, at the Mechanic's National Bank of the City of Chicago, being one year's interest on bond, numbered as above.

The bonds offered in evidence read as follows:

Know all men by these presents, that the township of Yellow Head, in the county of Kankakee and state of Illinois, acknowledges itself to owe and be indebted in the sum of five hundred dollars, lawful money of the United States of America, which sum of money the said township of Yellow Head promises to pay to the bearer, ———, at the office of the county treasurer of said county, on the first day of March, in the year one thousand eight hundred and ———, with interest thereon at the rate of ten per cent. per annum, which interest shall be payable yearly on the first day of March in each year, at the Mechanic's National Bank, in the city of Chicago, upon presentation and delivery of the warrants or coupons, severally hereto annexed, until the payment of the said principal sum.

This bond is issued under and by virtue of a law of the state of Illinois entitled, "An act to authorize cities and towns, or townships, lying within certain limits, to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville and Vincennes Railroad," approved March 7th, 1867. Also, under and by virtue of a law of said state entitled, "An act to legalize certain aids heretofore voted and granted to aid in the construction of the Chicago, Danville and Vincennes Railroad," approved February 26th, 1869, and in accordance with the vote of the electors of said township, at a special election held June 8th, 1868, in accordance with said act; and the faith of said township of Yellow Head is hereby pledged for the payment of said principal sum and interest as aforesaid.

Wilson, Perry & Sturges, for plaintiff.

Monroe, Bisbee & Gibbs, for defendant, cited the following authorities: Dillon on Municipal Corporations, 149, § 228; *Pendleton Co. vs. Cary*, 13 Wallace, 304; *Marshall vs. Cook*, 38 Illinois, 44; *Moran vs. Commissioners of Miami Co.*, 2 Black, 722; *Starin vs. Town of Genoa*, 23 New York, 439; *Knox Co. vs. Aspinwall*, 21 Howard, 539; *Marsh vs. Fulton Co.*, 10 Wallace, 676; *Aspinwall vs. Commissioners of Jo Davies Co.*, 22 Howard, 364; *Stoddard vs. Gilman*, 22 Vermont, 568; *Pond vs. Negus*, 3 Massachusetts, 230; *Stine vs. Supervisors*, 47 Illinois, 256; *Beckwith vs. English*, 51 Illinois, 147; *People vs. Dutcher*, 56 Illinois, 144.

Blodgett, J.: The defense interposed to a recovery on this bond is the want of compliance on the part of the town, with

the conditions precedent, which authorize a town, county, or city, to issue bonds of this description.

The statute of March 7, 1867,[1] of this state, referred to in the bond, provides in substance, that before any town on the line of said railroad shall issue bonds to aid in the construction thereof, the question of whether such aid shall be given, the amount, and the manner in which it shall be given, shall be submitted to the legal voters of the town, either at a regular or special election, of which due notice shall be given.

The evidence in this case shows that a meeting was duly called to be held in the town of Yellow Head on the 8th of June, 1868, for the purpose of voting upon the question of contributing the sum of eighteen thousand dollars to aid in the construction of the Chicago, Danville and Vincennes Railroad, and also in regard to donating the right of way for said railroad through said town.

The election was held in pursuance of this call, at which a large majority of the votes cast were in favor of the donation asked for, and also of donating the right of way.

It also appears that subsequent to this meeting or election another town meeting was called and held on the 18th of July of the same year, and while the proceedings of this meeting seem to have been somewhat irregular, and the record does not show very definitely what the objects or intentions thereof were, the purpose evidently was to rescind, so far as they could be rescinded, the proceedings of the meeting of the 8th of June, and to vote a donation of twenty thousand dollars in lieu of the eighteen thousand dollars and the right of way voted on the 8th of June, and the result of the meeting was a rescinding of the vote of June 8th, and a donation of twenty thousand dollars without the right of way, and also limiting that donation to a certain time, and the establishment of a depot at a certain point.

On the 26th of February, 1869, the legislature of this state

[1] Private Laws of Illinois, Vol. 2, p. 842.

passed an act in regard to the town aid for the railroad in question, the first section of which act is as follows:

"SECTION 1. *Be it enacted, etc.*, That the taxes, aids and appropriations heretofore voted by towns, townships, or cities, along the proposed route of the Chicago, Danville and Vincennes Railroad, or in the vicinity of said railroad, be, and the same are hereby legalized, ratified and confirmed, and the appropriation so made by the township of Yellow Head, in the county of Kankakee, on the 8th day of June, 1868, is hereby legalized and made valid; *provided*, said road shall run through said township of Yellow Head."[1]

The bonds were issued, duly signed by the supervisor and town clerk, and prior to the issue of the bonds the auditing board of the town audited the claim in favor of the Chicago, Danville and Vincennes Railroad for the sum of eighteen thousand dollars, and directed the issue of the bonds.

The evidence in the case also shows the fact that these bonds were put upon the market and bought by plaintiff for full value by the present owners. It also appears that said railroad was built through said town.

It is contended on the part of the defendant in this case that inasmuch as this donation had not been formally accepted by the railroad company at the time of the meeting of July 18th, it was in the power of the voters of the town to revoke the action of the 8th of June, and thereby invalidate the proceedings of the first meeting; that until the offer of these bonds had been formally accepted, or the railroad company had done something which showed that they accepted the offer of this assistance, the act was revocable.

It is urged with a great deal of force and ability on the part of the defendant's counsel, that this action of the 8th of June having been rescinded by the meeting of the 18th of July, the bonds were therefore issued without the performance of the preliminary conditions; that the case stands, so far as the

[1] Private Laws of Illinois, Vol. 3, p. 355.

records of the town are concerned, precisely as though the meeting of the 8th of June had not been held, and that, therefore, the bonds were issued without a compliance with the conditions precedent, which authorize a township to bind itself in this form.

Without going into a careful analysis of the numerous cases and authorities which have been cited, the law is abundantly settled, as it seems to me, that where the bonds of a municipal corporation have passed into circulation, and into the hands of *bona fide* holders for value, and such bonds bear upon their face the assertion that the pre-requisites have been complied with, the town is estopped from asserting or pleading a denial of the performance of such pre-requisites.

It seems to me this defense cannot be heard; that after these bonds have passed into circulation and have been sold in the market for value, the town cannot be permitted to question the truth of the assertion, solemnly made upon the face of the bonds, by the grantors who put them into circulation.

The bonds show unequivocally that they are issued in conformity with the act of the legislature of March 7th, 1867, and of the act of February 26th, 1869, and of the township meeting of June 8th, 1868.

So much as to the recital in the bond.

There is still another view to be taken of the question, which, I think, is not less cogent. The law of February 26th, 1869, provides that, "The appropriation so made"—that is, made to the Chicago, Danville and Vincennes Railroad—"by the township of Yellow Head, in the county of Kankakee, on the 8th day of June, 1868, is hereby legalized and made valid."

Now, it is competent for the legislature to delegate to these municipal corporations any powers which they see fit for the management of their local affairs.

The legislature might authorize the town authorities of the town of Yellow Head to issue bonds in aid of any public enterprise without the vote of the people. Under the constitution in force at the time the act of February 26th, 1869, was passed,

the legislature could authorize these municipal corporations to incur debt *ad libitum*, and issue bonds for their payment.

It is purely a question of power on the part of the town authorities, and if the legislature, by a special act, sees fit to waive the condition which applies generally and authorize the incurring of indebtedness for any special object, the power is complete.

Now, this language of the act of 1869 is very significant, and it seems to me it is tantamount to saying that no matter what the people of the town might have done afterwards, the legislature intends to authorize the town authorities to issue the bonds voted by the town meeting of the 8th of June, 1868. The law must have been so understood by the town authorities, and I think such is its true interpretation.

The view which I take of this case, of course, makes it unnecessary for me to go into any careful analysis of the cases cited.

These bonds bear upon their face an assertion that the prerequisites, which would make them legal and binding, had been complied with; they were put in circulation, and as the court must presume, were negotiated on the faith of that statement.

They must, therefore, be held valid.

The court finds the issues for the plaintiff, and assesses the damages at nineteen hundred dollars, being the amount of the coupons and interest at six per cent. since maturity.

For a further discussion of the various questions arising on municipal bonds, consult *Mygatt vs. City of Green Bay*, Vol. 1 of this Series, p. 292; *Luling vs, City of Racine*, Id., p. 814; *Schenck vs. Supervisors of Marshall County*, Id., p. 533; *Goedgen vs. Supervisors of Manitowoc County*, Vol. 2 do., p. 328; *Nugent vs. Putuam County, ante*, 105, and numerous authorities in those cases cited. [*Reporter.*

NORTHWESTERN FERTILIZING COMPANY vs. TOWN OF HYDE PARK.

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — MARCH, 1873.

JURISDICTION.

1. A corporation is included in the word "person," in the act of April 20th, 1871.

2. The fact that persons hold their rights or property under the name of a corporation does not deprive them of the right and remedies conferred by law and the constitution.

3. Where the statute gives a remedy for a wrong if done *by* a corporation, the same right is given if the wrong is done *to* the corporation.

This was a bill in equity filed by the Northwestern Fertilizing Company against the town of Hyde Park and its corporate officers and agents, to restrain them from interfering with what were claimed to be its chartered rights, by the passage and enforcement of certain town ordinances then passed or threatened.

This company was organized under a special statute of the legislature of the state of Illinois, passed March 8, 1867, (private laws of 1867, volume I, page 927,) granting to certain parties the right to manufacture a fertilizer out of the offal of the animals slaughtered in the city of Chicago. Under this act they located their works about twelve miles south of the city of Chicago, on the Calumet river, near its mouth, and commenced the manufacture of the fertilizing material.

The place at that time was not within the corporate limits of the town of Hyde Park, but was afterwards included within them, and the authorities of the town were proceeding against the works as a nuisance, and endeavoring by town ordinances and police regulations to stop their operations or compel them

to be carried on in such a way as not to be offensive to residents of the neighborhood.

The defendants moved to dismiss the bill on the ground of want of jurisdiction of the court.

Bentley, Swett & Quigg, and *Beckwith, Ayer & Kales*, for complainant.

Hitchcock, Dupee & Evarts, Sidney Smith, and *Leaming & Thompson*, for defendants.

DRUMMOND, J.: The question is, whether this court has jurisdiction of the bill.

There is no doubt that, under the decisions of the Supreme Court of the United States, when a state creates a private corporation, and clothes certain persons with rights under the charter, that it may be to some extent a contract protected by the Constitution of the United States. While there has been more or less of a struggle in relation to that, still it must be considered the settled law of the Supreme Court of the United States, and, of course, is the law of this court; and, therefore, the charter granted by the legislature of Illinois, in March, 1867, to the persons constituting the Northwestern Fertilizing Company must be considered in some respects in the nature of a contract which the legislature had no right by subsequent laws to interfere with. And where any constitutional right is sought to be affected by the legislation of a state, it is competent for Congress in such case to clothe the federal courts with original jurisdiction, or with jurisdiction by transfer from the state courts.

The first section of the act of the 20th April, 1871,[1] declares "that any person who, under color of any law, statute, ordinance, regulation, custom or usage of any state shall subject, or cause to be subjected any person within the jurisdiction of the United States, to the deprivation of any rights, privileges,

[1] 17 U. S. Statutes at Large, 13.

or immunities, secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage to the contrary notwithstanding, be liable to the party injured, in any action at law, suit in equity, or other proper proceeding for redress."

One of the objections made to the jurisdiction of the court is that this law refers to *persons*, and it is said they must be natural persons, and that — this being a statute passed under the provisions of the fourteenth amendment of the Constitution—Congress did not intend to include corporations by this language; and this objection is certainly not without force. But I am inclined to think that it ought not to prevail, provided certain facts appear in the case to show that they are persons who have "rights, privileges or immunities secured by the Constitution," and which are affected "by color of any law, statute, ordinance, regulation, custom, or usage of any state." It seems to me that the fact that these persons hold their rights or property under the name of a corporation, cannot deprive them of the rights and remedies which the Constitution and the law sought to confer. It is true that the Supreme Court of the United States has decided, in the case of *Paul vs. Virginia*, 8 Wallace, 168, that where the Constitution declared that the citizens of each state shall have the same immunities and privileges as the citizens of the several states; that is to say, there should be no law of discrimination made by any state against the citizens of another state; that meant persons and not corporations, and, therefore, that it did not prevent a state from declaring that a corporation of another state should not have the right to transact business except on special terms, as by obtaining a license. In that case, and in the one that went up from this state, *Ducat vs. Chicago*, 10 Wallace, 410, the state imposed upon a foreign corporation certain restrictions as conditions precedent to the transaction of business in the state, and the corporators endeavored to protect themselves under the principle that they were, as a corporation, a citizen of the United States, and therefore, they had the same immunites as

the citizens of the states which attempted to impose penalties or burdens upon them different from those that were imposed upon the citizens of those states. In that case, the court held that these acts of the state were within the authority of the Constitution, and that they did not violate that provision, because the language referred to citizens—to persons, and not to corporations; and although it was true that for the purpose of the jurisdiction of the federal courts, a corporation was a citizen, still it was not true that they were protected in the same way precisely as a natural person who was a citizen of another state.

It is to be observed that the question in this case is whether the court has jurisdiction in order to protect the rights of the corporation and its property, and therefore, the rights, privileges and property of the persons who constitute the corporation. It is then a question of jurisdiction here, and in the same way as it was a question of jurisdiction whether a corporation was a citizen within the meaning of that term in the Constitution, so as to authorize the federal courts to take jurisdiction in controversies between a corporation and an individual. It seems to me it would be "sticking in the bark" to hold that the rights of a person in relation to his property should be protected under these provisions of the Constitution and law where he was simply an individual, and the rights of the same person as to property, as a member of a corporation, should not also be protected. Why, for example, if a corporation as such, under color of any law, statute, ordinance, regulation, custom or usage, should subject or cause to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges or immunities secured by the Constitution of the United States, should not the individual have redress against the corporation? And yet the language of the law is "a person," and not a corporation. Why should a party be protected if the wrong was done by a person, and not protected if it was done by a corporation, where it is a question as to the jurisdiction of a court? Why, in other

words, cannot the court treat a corporation, if that does the wrong, as a person, precisely as the courts have always treated a corporation as a citizen, for the purpose of maintaining jurisdiction where rights are affected? It seems to me if the bill shows that the rights of the corporators are affected within the terms of this law they may seek the redress which is there pointed out. They claim that as individuals constituting the corporation, they possess certain privileges secured by the Constitution of the United States, of which they are to be deprived, or which are to be affected under color of a law, statute, ordinance, regulation, custom or usage, within the terms of this provision of the law, and, inasmuch as I think where if the wrong was done *by* a corporation there would be a remedy under the statute, I also think that where the wrong is done *to* the corporation, (or the individuals of which it is composed,) the same right is given to the corporation.[1]

The statute of April 20, 1871, declares that such proceedings are to be prosecuted in the several district or circuit courts of the United States with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in said courts.

I think, therefore, upon a proper showing, a bill may be maintained in this court by the Northwestern Fertilizing Company.

Motion to dismiss overruled.

[1] See Sec. 2, Act of February 25, 1871, 16 U. S. Statutes at Large, 431.

GAUGHAN vs. NORTHWESTERN FERTILIZING COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—MARCH TERM, 1873.

REMOVAL FROM STATE COURTS.

1 The act of April 20th, 1871, does not authorize the removal of a case from the state courts in every case in which the United States courts would have original jurisdiction.

2. Congress did not intend by the general words used to extend jurisdiction and to authorize removal, except under the circumstances specified in the several acts.

3. Doubtful jurisdiction not entertained.

This was a bill filed by John Gaughan, a property owner in the town of Hyde Park, against the defendants to restrain them from carrying on their business of manufacturing fertilizing material out of animal matter, on the ground that their works were a public nuisance, and injurious to his property and health.

The bill was originally filed in the circuit court of Cook county, but removed to this court by writ of *certiorari* on application of the defendants. This was a motion by the complainant to remand the case, on the ground that this court had no jurisdiction of the cause.

Further facts appear in the case preceding.

Beckwith, Ayer & Kales, and *Bentley, Swett & Quigg*, for complainant.

Hitchcock, Dupee & Evarts, and *Sidney Smith*, for defendants.

DRUMMOND, J.: After the best consideration I have been able to give the subject, I am not satisfied that the court has

jurisdiction. And I think in all such cases the court ought not to take jurisdiction. The ground upon which it is claimed that the case can be transferred is certainly a plausible one. It is this: That the first section of the act of April 20, 1871,[1] declares, "that such proceedings were to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the 9th of April, 1866, entitled, 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication;' and the other remedial laws of the United States, which are in their nature applicable in such cases." Now, the position on the part of the counsel who claim that the court has jurisdiction to remove this case by *certiorari*, is, as I understand it, (and it comes to that,) that, wherever the court has original jurisdiction, it can transfer a case from the state to the federal court under this language of the act of April 20, 1871: "Other remedies provided in like cases in such courts and the other remedial laws of the United States which are in their nature applicable in such cases." If that is the true construction of this statute, then, of course, the court would have jurisdiction to issue a *certiorari* and to take cognizance of the case. But I am not satisfied that is the true construction, and it seems to me it would be going further than any court has yet gone to construe such general language as this so as to include within its scope every case where a question would arise under the Constitution of the United States. As was stated the other day, numerous questions have arisen affecting rights under the Constitution of the United States, where parties seeking their remedy have been obliged to seek it through the forum of the state courts, and so on up to the Supreme Court of the United States, under the twenty-fifth section of the act of 1789, and other legislation since.

[1] 17 U. S. Statutes at Large, 13.

It is necessary to consider what these previous statutes are—"other remedies provided in like cases." It refers particularly to the act of 1866.[1] That act refers to the act of 1863.[2] It is under the acts of 1833, 1863, 1866, and 1871, as I understand, that the claim is set up, that a fair construction of this act of April 20, 1871, will include within its scope all the cases, so as to authorize a transfer where it gives original jurisdiction to the district or the circuit court. While the argument is not without force, I cannot yield my conviction entirely to it. I will state very briefly some reasons why I cannot. If we look to the legislation of Congress in relation to the cases which might be removed from the state to the federal courts, we see that, in all cases where a removal has been authorized, the circumstances under which it is to take place are specifically set forth. It is so under the act of 1833,[3] the language of the second section of which is: "The jurisdiction of the circuit courts of the United States shall extend to all cases in law or equity arising under the revenue laws of the United States, for which other provisions are not already made by law." But the third section declares under what particular circumstances a case was to be removed from the state to the federal court: "In any case where suit or prosecution shall be commenced in a court of any state against any officer or other person for or on account of any act done under the revenue laws of the United States, or under color thereof, for or on account of any right, authority, or title set up or claimed by such officer, it shall be lawful for the," etc.,—setting up in precise language under what circumstances the case was to be removed. And the third section is substantially copied into the sixteenth section of the act of February 28, 1871—*mutatis mutandis*—simply changing the words in some particular

[1] 14 U. S. Statutes at Large, 27.
[2] 12 U. S. Statutes at Large, 755.
[3] 4 U. S. Statutes at Large, 632.

instances. The language of that section is:[1] "In any case where suit or prosecution, civil or criminal, shall be commenced in a court of any state against any officer of the United States, or other person, for or on account of any act done under the provisions of this act, or under color thereof, for or on account of any right, authority, or title set up or claimed by such officer or other person under any of said provisions," it shall be lawful to transfer, setting forth specifically, just like the act of 1833, the circumstances under which the transfer could be made. The fifth section of the act of 1863 is also specific: "If any suit or prosecution, civil or criminal, has been or shall be commenced in any state court against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespass, or wrongs done or committed, or any act omitted to be done at any time during the present rebellion by virtue of, or under color of authority or direction from and exercised by or under the President of the United States, or of any act of Congress, he shall, at the time of entering his appearance in such court," have the right to transfer the case—showing the circumstances under which it can be transferred. The first section of the act of 1866 declares that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States, and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the parties shall have been duly convicted, shall have the same right in every state and territory in the United States to make and enforce contracts, to sue and be sued, to give evidence," etc. The third section declares that if certain circumstances occur where rights are affected by a proceeding in a state court, then the party shall have the right to transfer the case to the federal court. The language of the third section is quite peculiar: "That the district courts of

[1] 16 U. S. Statutes at Large, 438.

the United States, within their respective districts, shall have, exclusive of the courts of the several states, cognizance of all crimes and offenses committed against the provisions of this act; * * * and if any suit or prosecution, civil or criminal, has been or shall be commenced in any state court against any such person for any cause whatsoever." Here is language more general than in any other statute, either before or after. Now, it could not be maintained that by this act of Congress every person whose rights were affected could transfer a case from the state to the federal court, simply because the language of the first section includes "all persons born in the United States." It certainly could not have been the intention of this section to give the federal courts jurisdiction of rights affecting any and all persons who were born in the United States. But it means, I apprehend, the persons referred to in the previous part of the section—who are denied or cannot enforce in the courts or judicial tribunals of the state or locality where they may be, any rights secured to them by the first section of the act. Now, this being the language of the various statutes upon the subject, thus setting out in a particular manner every contingency, which must concur in order to authorize the transfer of a case from the state to the federal court, is it to be supposed that Congress intended, in this act of the 20th of April, 1871, by such general language (varying therein the rule which had always been adopted in previous legislation) to authorize the transfer? All these statutes give generally the rights, just as this law, and declare that the courts of the United States shall have jurisdiction; but they do not, on that account, declare that, in all such cases, they may be removed from the state to the federal court. They specify the circumstances which must exist in order to authorize the removal, and it seems to me the argument is very strong—so strong that I do not feel inclined to take jurisdiction of the case—as they have been specific in every other case they did not intend by this general language to authorize the removal of a case from the state to the federal court. It is not pretended that the right

set up here is within the language of any one of the statutes authorizing the transfer. As I have said, we must take the ground that, in every case where this statute gives original jurisdiction, it was the intention that the case might be transferred. This is a right set up under the authority of the state—a charter created by the state. It may be when, by the charter, the corporation is clothed with certain rights, that then the Constitution of the United States throws its protecting arm around those rights, and declares that they shall not be affected by subsequent legislation of the states; that the charter, for certain purposes, is in the nature of a contract, and that it cannot be impaired by subsequent legislation. That is the right which is set up; and it is claimed that where a party is sued in the state court, if this right is thus set up, the case can be transferred. I have thought, and for the purposes of the motion so held, that the language of the first section of the act of April 20, 1871, was express in giving the court original jurisdiction, and that the only question was whether the fact that it was a corporation deprived it of the power to come into the federal court. I held that it did not; that if it was the case of an individual whose rights were affected it could come into the federal court, and that it did not lose that right because it was a corporation. But I am asked to go further, and hold that, in all these cases, wherever there is original jurisdiction, the case can be transferred, and that upon a particular showing it must be transferred, because the language of the various acts of Congress is whenever the contingencies have occurred provided therein it shall be the duty of the state court to proceed no further in the cause, and it has been held that all acts subsequently done by the state court are simply void, and that the parties may disregard them. This is the view I take of the question. I admit it is one of importance. The other question is not free from difficulty, but I have felt inclined to sustain the jurisdiction in that case. The inclination of my mind is against it in this case, and I am willing to make an order remanding the case to the state court, and give the

parties, if they so desire, an opportunity of testing the question before the Supreme Court of the United States, which they will have the right to do at once.

Case remanded.

In re NOONAN.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—APRIL, 1873.

IN BANKRUPTCY.

PETITION FOR REVIEW.

1. PARTNER CAN FILE PETITION EVEN AFTER RECEIVER APPOINTED.—The bankrupt court has jurisdiction of a petition by one partner to have the firm declared bankrupts, even though proceedings are pending in a state court to wind up the partnership, and a receiver had been appointed who had taken possession of the assets.

2. NO ACT OF BANKRUPTCY NECESSARY.—Such a petition being voluntary as to him, it is not necessary that there should be an act of bankruptcy alleged.

3. JURISDICTION NOT ARRESTED BY DISSOLUTION.—A dissolution by the act of all or any of the partners does not put an end to the power of the bankrupt court.

4. So long as any unfinished business, debts, credits, or assets remain, the bankrupt court has jurisdiction, a proper case being made.

Josiah A. Noonan and Peter McNab were partners prior to June 2d, 1870. On that day proceedings were commenced by McNab in the state court to put an end to the partnership, and for an account. The state court appointed a receiver, who took charge of the assets of the firm. These proceedings were still pending when, on the 29th of October, 1872, Noonan filed

a petition in the district court of the United States, claiming the benefit of the bankrupt law for himself, and also alleging that the partnership was insolvent, asking that it be declared bankrupt. McNab refused to join in these proceedings in bankruptcy, and made a motion in the district court to dismiss the petition on the ground that the partnership was at an end, and because the assets of the firm were in the hands of the receiver, and the court had no right to adjudicate as to the partnership.

The motion was overruled, and the court proceeded to try the issue of bankruptcy; the jury rendered a verdict that the partnership was insolvent.

Thereupon McNab filed this petition for review. No point was made in this court as to the authority of the court to review the ruling of the district court on the petition.

Orton & Winkler, for petitioner in review, cited the following authorities: Parsons on Partnership, 470; Story on Partnership, §§ 310, 311; *Noonan vs. McNab*, 30 Wisconsin, 277; Sec. 36 Bankrupt Law, and Order 18; Bump, 54; *In re Crockett*, 2 Bankrupt Register, 75; *In re Winkens*, 2 Id., 113; *In re Hartough*, 3 Id., 107; *In re Downing*, Id., 182; *In re Abbey*, 2 Id., 26; *In re Freeman*, 4 Id., 17; *In re Clark and Bininger*, 3 Id., 129, 130; *Sedgwick vs. Place*, 1 Id., 204; *Alden vs. Boston, etc., R. R. Co.*, 5 Id., 230; *Clark vs. Bininger*, 38 Howard Pr., 341; *Clark vs. Bininger*, 39 Id., 363.

Wm. P. Lynde and *Jason Downer, contra*, cited: *In re Clark and Bininger*, 4 Benedict R., 38; *In re Independent Insurance Company*, 6 Bankrupt Register, 260; *In re Safe Deposit and Savings Institution*, 7 Id., 393; *In re Bininger*, 7 Blatchford, 274; Bump, (5 ed.,) 497, 498.

DRUMMOND, J.: The only question in the case is whether, after proceedings are commenced in a state court, by one of the partners, to put an end to the partnership and for an account, and the property is in the hands of a receiver, it is competent

for another member of the firm to file a petition in bankruptcy for himself and for the firm.

It is insisted on the part of the petitioner in this court, that the partnership has been dissolved, that all the assets are in the hands of a receiver of the state court, and that the district court had no jurisdiction of the case as against McNab. The authorities were fully considered by the counsel, on the argument in this court, and it must be admitted that some of them, perhaps most of them, have assumed that the 36th section of the bankrupt act, when it speaks of the adjudication of bankruptcy as to partners, refers to them as existing partners, and that it does not mean a case where the partnership has been dissolved, and the assets are in the hands of a third person, either with the consent of the partners or by the act of a court of competent jurisdiction. But my opinion is that this view of the law which has been taken by some of the judges is entirely too narrow.

I do not think that is the true construction of the 36th section of the bankrupt law. Undoubtedly there is something in the language which at first might be supposed to lead naturally to such a conclusion. But when we consider it more fully, we must admit that it is not susceptible of such a construction.

The language is: "Where two or more persons who are partners in trade, shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue," etc.

It is to be observed that it does not point out, in distinct terms, what is to be the course of the proceedings in the case of a petition where partners are concerned, but it speaks of it as a fact accomplished, and by necessary implication that it can be done in the way here pointed out.

It refers to the adjudication of the bankruptcy of partners as being on the petition of the partners themselves, or one of them, or by a creditor of the partners.

It uses the present tense, it is true, but too much force, I think, has been given to this language, "Who *are* partners in

trade." I consider it as meaning nothing more than if it had said, where two or more persons, partners in trade, shall be adjudged bankrupt, etc. It certainly could not have been the meaning that the partners, by a mere act of their own, as by a voluntary dissolution at the instance of all or of one, could deprive a creditor of the right of putting the firm into bankruptcy. Neither could it have been the meaning that a creditor should be deprived of that right if the partners had transferred all their assets to an assignee by a voluntary act of their own.

That would be a very easy way of avoiding the effects of the bankrupt law.

I understand this language to mean that whenever, looking at the partnership either present or past, it is within the province of the bankrupt law to bring the debts of the partnership or its credits or assets within the control of the bankrupt court, there can be an adjudication of bankruptcy against the firm. In other words, that for the purpose of the bankrupt law they are partners, and that the bankrupt court has authority to settle up the partnership.

The courts which have held that this language applies to a present existing partnership alone, have to admit that the mere dissolution of the firm by the joint act of the partners, or by the act of one, does not put an end to the power of the bankrupt court.

They have declared that if there are any assets of the firm, although the partnership may have been dissolved, that gives authority to the bankrupt court to proceed and wind up the affairs of the partnership.

But it may be one of the very questions in the case whether or not there are partnership assets, and this question the bankrupt court will have a right to determine.

It may be if there is nothing of the firm remaining, no business transactions, and neither debts, credits nor assets, and the firm is dissolved, that there is nothing for the bankrupt court to operate upon; but as long as there is any unfinished

business on the part of the firm, debts, or credits, or assets of any kind, it seems to me that, upon a proper case made, it is the province of the bankrupt court to settle it and that it is the right either of the partners themselves, or of one of them, or of a creditor, to go into the bankrupt court for that purpose.

There certainly could not be any doubt but that the partners, by a voluntary act, could come into the court and obtain a decree in bankruptcy against themselves, even though there might have been a formal dissolution of the firm, provided there was any business, debts or credits of the partnership remaining, and thus be discharged from their debts. And if they together have the right to do it, why has not one of them the same right?

The language is just as applicable to one as to all the partners, or to the creditors of the firm; indeed the authorities referred to concede this. And it is difficult to see how any member of a firm can be released from his personal liability as such without the court substantially looking into all the transactions of the firm and settling up its affairs. A man cannot be discharged from his liabilities as a member of a firm unless the debts and assets of the firm are considered and adjudicated upon by the court.

It is to be observed that this court is not now called on to decide what is to be the effect of this petition in bankruptcy by one member of the firm upon the property of the firm in the hands of the receiver.

The real question is whether one of the members of the firm is prevented from calling the partnership into court and having it declared bankrupt, because of these proceedings in the state court. I hold that he is not.

It perhaps may be illustrated further. Where the petition is voluntarily filed by the members of the firm, of course there could in one sense be no adjudication of a subsisting firm, as the petition, when filed by all the partners, is an act of bankruptcy, as the statute declares, and consequently works a dissolution of the partnership.

I can, therefore, have no doubt that the decision of the court below was correct on this point, and that the proceedings in the state court did not prevent the court from taking jurisdiction, not only of Noonan, but of McNab, as a member of the firm of Noonan & McNab. To hold otherwise, would be to put it in the power of any member of a firm, at any time, to prevent the affairs of the firm from being settled up in the bankrupt court, where it had committed an act of bankruptcy. But it is not necessary, in such a case as this, that there should be an act of bankruptcy alleged. This partakes of the mixed nature of a voluntary and an involuntary proceeding. It is a petition by a member of the firm, and voluntary as to him, but involuntary as to the other member of the firm.

Order of the district court, refusing to dismiss the petition, affirmed.

KELLOGG vs. LACROSSE AND MINNESOTA PACKET COMPANY.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—APRIL TERM, 1873.

DUTY OF CARRIER.

1. It is the duty of a carrier by water to provide a sea-worthy vessel. A barge for carrying wheat must be tight, strong and sound.

2. The carrier is bound to know the condition and strength of his vessel.

3. The leaking of a barge is notice of her unseaworthiness, and the carrier attempting to proceed on the voyage with her is liable for the loss of the cargo.

Kellogg vs. LaCrosse, etc., Co.

This was a libel *in personam* by James B. Kellogg to recover for a cargo of wheat shipped at Winona, Minnesota, by Kellogg & Mann, on board the defendant's barge Victor, to be forwarded to LaCrosse, in the state of Wisconsin, on the Mississippi river, in good order, unavoidable dangers of the river and fire excepted. For a valuable consideration, the consignees assigned to the libellant their bill of lading and all claim for damages, by the loss of the cargo. The barge while being towed down the river, by the respondent's steamboat, on the trip to LaCrosse, at the point at the head of Dacotah Island sank in twenty feet of water, and the cargo of wheat became a total loss.

E. Mariner, for libellant.

John W. Cary, for respondent, cited: 1 Phillips on Insurance, 304; *Talcott vs. Commercial Insurance Company*, 2 Johnson, 124; *Barnwall vs. Church*, 1 Caines, 217; *Cort vs. Delaware Insurance Company*, 2 Washington, 375; 2 Parsons on Maritime Law, 138–9; *Walsh vs. Washington Insurance Company*, 32 New York, 427; *The Northern Belle*, 9 Wallace, 526.

MILLER, J.: The respondents, in their answer, allege that about eleven o'clock and thirty minutes P. M. of the 16th of April, 1866, the steamer and barge left Winona, the wind blowing strong up stream, but that nothing material occurred until they had reached a point about six miles below Winona, when the wind became stronger and caused the barge to beat heavily against the fenders of the steamboat; that on an examination of the barge then and there made, it was found to have sprung a leak and to be leaking freely, and every possible effort was made by pumping to overcome the leaking, but without avail; that the leak gained and the wind continued to blow strong in the heavy gusts, and in making a crossing necessary to be made, the waves running very high, the barge

was swamped at a point near Dacotah Island, and barge and cargo became a total loss.

It is in proof that the barge Victor was old, and was originally constructed with knuckles instead of knees, and was open decked; that immediately prior to making this first trip in the spring, she was overhauled by the ship carpenter of the respondent, and put in repair in such places as in his judgment required the substitution of new timbers. On inspection of the barge a portion of the old timbers were found to be in a state of decay. At Homer, six miles below Winona, they put in for wood, when the barge was discovered to be leaking. Two pumps were then and there used, but according to the answer, without effect; and they proceeded down the river, with the water gaining in the barge, as set forth in the answer. The river was running full; the wind fresh, quartering up stream, and the night was very dark.

The barge was fastened to the starboard side of the steamboat with three lines, head line, tow line, and back line, and she had two pumps, one at each end. The master was on watch when they left Winona. He turned in at Homer, while they were wooding; was called out on account of the leaking of the barge. Pumps were applied, when he turned in again, and was at last called out on notice that the barge was sinking.

They stopped at Trempealeau, and a short time after leaving that place, about Richmond, the watchman reported that the barge was making water. Two pumps were started, and two additional ones were put in use, and still the leak gained on them to such an extent that the men left off pumping and had just got off the barge when she rolled over.

The barge being fastened to the starboard side of the steamboat, and the wind blowing up stream, quartering from the Wisconsin shore and they passing from the Minnesota towards the Wisconsin shore, the barge would be partially under the lee of the steamboat, and at the point represented on the map, where the barge sunk, she was entirely under the lee of the

steamboat, and off Dacotah Island. That point is about twenty-two miles from Winona. Allowing thirty minutes at Homer for wooding, and for the stop at Trempealeau fifteen minutes, they run from Winona to the island at about the rate of eleven miles an hour.

I think the weight of reliable testimony is, that there was no wind to disturb them until about making the last crossing towards Dacotah Island. It is not probable that the master of the steamboat would have turned in, even during his watch, and remained in, with one exception, for a few minutes, until notified that the barge was sinking, if the wind disturbed them.

The wells of the barge had not been examined before departing from Winona. The master of the steamboat was presumed to know, and the respondent or its agents were bound to know, that the Victor was a very old barge, not originally constructed of adequate strength to carry a cargo of wheat in bulk at all stages of water in ordinary conditions of weather.

In addition to this evidence, the leaking of the barge at Homer was sufficient notification to the master of her unseaworthiness. From the leaking at Homer, only six miles on the trip, in the absence of any known cause, unseaworthiness of the barge may be legally presumed.

The barge should have been left, safely moored, at Homer, or returned to Winona for the transfer of the cargo to another barge. It was then demonstrated that the barge was not sufficient for the service.

The Supreme Court of the United States, in affirming a decree of this court, in the case of the *Northern Belle*,[1] decides that "it is the duty of a carrier of grain in bulk in barges, on the western rivers, to see that his barge is capable of resisting, without subjecting the barge to injury, all the external forces to which it is subjected in the ordinary course of navigation, including especially those incidents to the narrow, crooked and

[1] 9 Wallace, 526.

shallow water, and the often changing courses in the currents of the river where they are; and to the force which the large steamers, which have them in tow, are often brought. The barge must be so tight that the water will not reach the cargo; so strong that the outward applications of external force will not spring a leak, or sink her; so sound that she will safely carry the cargo in bulk through the ordinary shocks to which she must every day be subjected. If she is capable of this she is sea-worthy; if she is not, she is unfit for the navigation of the river. It is the duty of the carrier to have his barges often examined and thoroughly inspected, so as to be sure of their condition. For this he is to be held rigidly responsible."

In my opinion the respondent was in fault:

First—For loading the barge unfit for the service with 4,574 bushels of wheat in bulk.

Second—For not examining and inspecting the barge before departing from Winona on her first trip after being repaired.

Third—For not leaving the barge at Homer, or taking her back to Winona after the leak was discovered, in order that the cargo could be transferred to another barge.

Fourth—For running on a very dark night at too great rate of speed.

Fifth—For that the master neglected his duty from Homer to the place of the accident.

Decree for the libellant.

As to duty of common carrier to provide a sea-worthy vessel, consult *Nine Hundred and Twenty-Eight Barrels of Salt*, Vol. 1 of this Series, 319; *The Northern Belle*, 2 do., 529.

As to duty after accident, consult *The Ocean Wave*, *ante*, 317.

[*Reporter.*

GERMANIA INSURANCE COMPANY vs. LA CROSSE AND MINNESOTA PACKET COMPANY.

DISTRICT COURT—EASTERN DISTRICT OF WISCONSIN—APRIL, 1873.

IN ADMIRALTY.

DELIVERY BY CARRIER.

1. WHAT CONSTITUTES.—Where a cargo of wheat is shipped in bulk, to be delivered under a bill of lading to a consignee who has charge of an elevator at the port of destination, it is not a sufficient delivery to moor the barge at the dock of the elevator during bad weather, without notice to the consignee.

2. CUSTOM.—An alleged custom so to moor barges, leaving them to be taken charge of by the elevator, does not discharge the carrier.

3. CONDITION OF CARGO.—The carrier must show satisfactorily that the cargo was in good order on arrival at its destination.

This was a libel *in personam* brought by several insurance companies to recover amounts paid by them respectively on policies of insurance on damaged wheat. The wheat had been shipped at Red Wing, Minnesota, on the steamboat Keokuk and barge Lucy, owned by respondent, to be delivered according to the bill of lading at La Crosse to ——— Whitney, or assigns, in good order, the unavoidable dangers of the river and fire excepted, he or they paying freight and charges. Whitney, the consignee, had charge of the elevator at La Crosse, and on unloading the wheat it was found to be damaged.

Mariner, Smith & Ordway, for libellants, cited *Garrison vs. Memphis Insurance Company*, 19 Howard, 316; *Oelricks vs. Ford*, 23 do., 63; *McGregor vs. Insurance Company*, 1 Washington C. C., 39; *Barnard vs. Kellogg*, 10 Wallace, 388; *Wadley vs. Davis*, 63 Barbour, 500, *Ostrander vs. Brown*, 15 Johnson, 39; *Gibson vs. Culver*, 17 Wendell, 305; *The Pey-*

tona, 2 Curtis C. C. R., 21; *Clendaniel vs. Tuckerman*, 17 Barbour, 184; *Richardson vs. Goddard*, 23 Howard, 28; *The Eddy*, 5 Wallace, 481.

Carys & Cottrill, for respondent.

MILLER, J.: It is alleged in the answer that the wheat was to be delivered at the elevator at La Crossé, and that on the arrival of the steamboat and barge at La Crosse the master and crew safely, properly and securely moored the barge Lucy, laden with the wheat, to the dock of the elevator at the usual and customary place for mooring barges whose cargoes were to be discharged at the elevator, and after the barge was so safely moored to the dock, the wind blowing fresh forced the barge laden with the wheat against the piles of the dock and caused the barge to leak and damage a portion of the wheat; and that the damage was caused by the unavoidable dangers of the river.

It is further averred in the answer that when the barge was caused to leak and damage the wheat, the voyage of the steamboat and barge had been fully completed and terminated, and that the cargo had been delivered at the port of La Crosse according to the terms of the bill of lading, and according to the custom of delivering cargoes of grain which were to be discharged at the elevator.

It appears in evidence that Whitney, mentioned in the bill of lading, was agent of the railroad company having charge of the elevator at La Crosse. Whitney's name appears in the bill of lading, as the course of business was to deliver all grain shipped in bulk to the elevator at La Crosse, the barges were moored at the dock at such place as entitled them to be discharged into the elevator in their order as to their time of arrival. When the barge's time for discharge came, the men in charge of the elevator loosed her from her mooring and brought her up to the proper position for discharge. The master of the "tow" considered his voyage at an end, and the

stipulations of the bill of lading performed, upon mooring the barge at the dock; such seems to have been the loose manner of business at that point.

There is no satisfactory evidence that the wheat was in good order when the barge arrived at the dock. The master of the steamer very seldom went on board a barge, and if on board the Lucy on the trip, he did not make any examination into the condition of the wheat. The mate did not report water in the hold, but he is not a witness in the case. One witness testifies that he was looking out for the Lucy; she arrived in the forenoon, and on that same forenoon the witness thinks the wheat was removed from the barge, immediately on its arrival at the elevator. The wheat was wet at the bottom. It may be that the barge had made water before arriving at the dock.

From the answer of the respondent and the evidence, the master and crew of the steamer left the barge in peril of the winds. The barge was made fast to the dock either in the midst of a blow or on the immediate approach of one, without regard to the safe delivery of the cargo. The master had no right, under those circumstances, to consider his voyage at an end. He was in fault even if the alleged custom was satisfactorily proven. Such neglect as this would be entirely inexcusable.

The alleged custom of mooring barges at the dock of the elevator and leaving them to be taken in charge of the elevator in turn, if proven to prevail in all cases, which it is not, would not excuse the carrier.

The bill of lading required the wheat to be delivered to Whitney at La Crosse. It is not alleged nor proven that there was notice to Whitney of the arrival of the barge with the cargo on board, or an offer to deliver the wheat to him. In order to relieve the carrier of responsibility, it should be made to appear at least that Whitney had such notice. The wheat was in no sense turned over to the custody of Whitney.

For these reasons a decree will be pronounced for libellants.

Ex parte NORWOOD.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—APRIL, 1873.

IN BANKRUPTCY.

1. FOREIGN RECEIVER MAY PROVE DEBT.—The receiver of a bankrupt corporation in another state can prove a debt against a bankrupt in this court.

2. Any person authorized to give an acquittance of a debt is entitled to prove that debt in bankruptcy.

3. WAIVER OF TIME IN MAKING PROOFS.—Where an insurance company furnished copies of the proofs of loss to a re-insuring company, and no objection was made to their form or substance, the company thereby waives the right to object that they were not furnished in apt time.

4. Objections to proofs of loss must be made by the company on their presentation, or within a reasonable time thereafter, or they will be considered as waived.

5. LIABILITY OF RE-INSURER.—A clause in the policy of re-insurance, "loss, if any, payable at the same time and *pro rata* with the insured," merely gives the company the benefit of any defense, deduction, or equity which the first insurer may have, making the liability of the re-insurer the same as the original insurer. It does not limit such liability to what the original insurer may have paid or be able to pay.

This was a motion by Joseph R. Payson, assignee of the Republic Fire Insurance Company, to expunge the claim filed by Carlisle Norwood, as receiver of the Lorillard Insurance Company of New York, on certain policies of re-insurance on which there had been a total loss. The facts further appear in the opinion.

Tenneys, Flower & Abercrombie, for assignee.

A corporation has no existence beyond the territory of the power that created it. *Day vs. Newark India Rubber Co.*, 1 Blatchford, 628; *Bank of Augusta vs. Earle*, 13 Peters, 588; *Ohio and Mississippi R. R. Co. vs. Wheeler*, 1 Black, 286;

County of Alleghany vs. C. and P. R. R. Co., 51 Pennsylvania State, 228.

But its existence, [if it does exist] may be recognized in other states. *Union Branch R. R. Co. vs. East Tennessee and Georgia R. R. Co.*, 14 Georgia, 327.

A dissolved corporation cannot sue, having no existence. *Commercial Bank vs. Lockwood*, 2 Harrington, 8; *Fox vs. Horah*, 1 Iredell, Eq., 358; *President, etc., Port Gibson vs. Moore*, 13 Smedes & Marshall, 157; *White vs. Campbell*, 5 Humphreys, 38; *Bank of Louisiana vs. Wilson*, 19 Louisiana Annual, 1; *May vs. State Bank of North Carolina*, 2 Robinson, 56; *Leather vs. Shipbuilders' Bank*, 40 Maine, 386; *Leach vs. Thomas*, 27 Illinois, 457. The Revised Statutes of Illinois, pages 95, 96, and the act of 1872 make no different rule in a case of this kind.

Foreign receivers have no title or authority by which they can sue. The statutory assignment to a receiver can only vest in him the title to property which is within the state that appoints him. The state has no power to pass the title to property which is beyond its boundaries; neither can it create an officer whose official character will follow him into another state. So Mr. Norwood has no title to any property here, and he is no "receiver" here, and hence he cannot maintain a suit. *Booth vs. Clark*, 17 Howard, 322; *Hoyt vs. Thompson*, 1 Selden, 320; *Hope Mutual Life Insurance Co. vs. Taylor*, 2 Robertson, 278; *Graydon vs. Church et al.*, 7 Michigan, 36; Wheaton on Conflict of Laws, § 359, *et seq.*

The assignee has, in effect, attached all the funds of the Republic Insurance Company for the benefit of domestic creditors.

The nature of the contract of re-insurance, when there are no express stipulations, is the policy. *Hone, Receiver, vs. Mutual Safety Insurance Co.*, 1 Sanford, 137, affirmed, 2 Comstock, 235; *Philadelphia Insurance Co. vs. Washington Insurance Co.*, 11 Harris, 250; *Yonkers and New York Fire*

Insurance Co. vs. Hoffman Fire Insurance Co., 6 Robertson, 316.

In all these cases the policy said, simply, "re-insure," instead of "insure." They all hold that the "re-insured" must make the same proofs of loss as the original insured. The words of one policy, "this company to pay *pro rata*, at and in the same time and manner as the company re-insured," were introduced for the very purpose of making a change from the law, as held in the above cases.

On the subject of "waiver" of the requirements of the policy, we make the following citations, showing that a waiver is not to be implied or guessed at without affirmative acts definitely indicating it. *Columbian Insurance Co. vs. Lawrence*, 2 Peters, 25 ; same case, 10 do., 507; *Klein vs. Franklin Insurance Co.*, 1 Harris, 247 ; *Trask vs. State Fire and Marine Insurance Co.*, 5 Casey, 198; *Phillips vs. Protection Insurance Co.*, 14 Missouri, 220; *Taylor vs. Merchants Fire Insurance Co.*, 9 Howard, 390; *Beatty vs. Lycoming Insurance Co.*, 66 Pennsylvania State, 9; *St. Louis Insurance Co. vs. Kyle*, 11 Missouri, 278; *Patrick vs. Farmer's Insurance Co.*, 43 New Hampshire, 621.

Fuller & Smith, for receiver.

By the laws of New York under which the Lorillard Insurance Company was created, all property, *choses in action*, and effects, vested in the Receiver. No assignment is essential to his title, and he may bring suit in his own name, either at law or in equity. *Gillett vs. Fairchild*, 4 Denio, 80; *Mann vs. Pentz*, 2 Sanford Ch., 257; *In re Eagle Iron Works*, 8 Paige, 386; *Eldred vs. Hall*, 9 Id., 640. The general principle is to permit the foreign assignee in bankruptcy to appear and sue in his own name, where there is no conflict with the assignor or with creditors. *Hunt vs. Jackson*, 5 Blatchford, 349; *Holmes vs. Remsen*, 4 Johnson, Ch., 485; *Alivon vs. Furnival*, 1 Crompton, Meeson & Roscoe, 296; *Blane vs. Drummond*, 1 Brockenbrough, 62; *Ingraham vs. Geyer*, 13 Massachusetts,

146; *Ball vs. Claflin*, 5 Pickering, 305; *Dickey vs. Harmon*, 1 Cranch C. C., 204. No conflict here, and certainly none affecting the *capacity* of the receiver to sue. Mere *choses in action* are transferable according to the law of the creditor's domicile —indisputably so if *there payable*. *Guillander vs. Howell*, 35 New York, 660; *Clark vs. Connecticut Peat Co.*, 35 Connecticut, 302; *Caskie vs. Webster*, 2 Wallace, Jr., 131; *Speed vs. May*, 17 Pennsylvania, 91. The foreign corporation is permitted to sue *ex comitate*. *Bank of Augusta vs. Earle*, 13 Peters, 519. And so its assignee by operation of law. *Hoyt vs. Thompson*, 1 Selden, 333. Proceedings in bankruptcy are equitable in their nature. If the claimant is entitled to the proceeds, he is entitled to claim. It has been ruled that assignees by *operation of law* may prove up in their own names. *In re Fortune*, 3 Bankrupt Register 83; *In re Murdock*, Id., 36. See *Dawes vs. Head*, 3 Pickering, 128; Story on Conflict of Laws, § 429. Parties in a contentious proceeding, either present or prospective, may agree that the issue shall be decided according to a particular law. Wharton on Conflict of Laws, 309. *Booth vs. Clark*, 17 Howard, 322, is inapplicable because (a) the question arose as to a receiver appointed *upon a creditor's bill;* (b) and as between such receiver and a claimant of another state, while here the assignee represents all the creditors; (c) the question was only mooted in relation to a receiver under statutes for the *collection of debts*, and not for the winding up of defunct corporations.

As to the attachments, they have all been dismissed, but were they pending it would make no difference. 1. Attachments and garnishee process in a state court, after suit in U. S. court, will not lie. *Wallace vs. McConnell*, 13 Peters, 136. 2. The corporation having been dissolved upon suit brought, no suit against it can be maintained. Drake on Attachments, §§ 433, 434; *Greeley vs. Smith*, 3 Story, 657; *F. and M. Bank vs. Little*, 8 Watts & Sergeant, 207; *Mumma vs. Potomac Co.*, 8 Peters, 286. This is so in the state of the creation of the corporation, as also as to all creditors who have *proved*

up before the receiver, and taken dividends, as is the fact in the case at bar. *Clay vs. Smith*, 3 Peters, 411; *Baldwin vs. Hale*, 1 Wallace, 223, 234; Baldwin, 296. This makes them parties to the litigation and bound by it. They cannot dispute the receiver's title. 3. Suit against the receiver admits the capacity in which he is acting. 4. The appointment vested all the property in the receiver. The decree of the New York court operated as a *sequestration or forfeiture*. 3 Parsons on Contracts, 473; *Jewett vs. Preston*, 27 Maine, 400; *Burnside vs. Merrick*, 4 Metcalf, 537. 5. The claims of attaching creditors cannot defeat the allowance of the claim in the first instance, and as here presented.

As to the alleged defenses. 1. It is objected that the proofs of loss are insufficient, because they are only copies of the original proofs. This is all the re-insurer can require. 17 Wendell, 359. And because not furnished in apt time. The answer is that they were furnished within a reasonable time, and the objection has been waived. *Longhurst vs. Star Insurance Co.*, 19 Iowa. 371; *Peoria, etc., Insurance Co. vs. Lewis*, 18 Illinois, 553; *Peoria, etc. Insurance Co. vs. Whitehill*, 25 do., 466; *Hartford Fire Insurance Co. vs. Walsh*, 54 do.. 165; *Owen vs. Farmers' Insurance Co.*, 57 Barbour, 518. It is said there can be no waiver after time has expired, that is that it requires an express agreement to revivify the contract. If this were so as to defects in matter, it is not as to time. *Patrick vs. Insurance Co.*, 43 New Hampshire, 623. But conditions as to proofs may always be waived, because they are conditions precedent, not to the undertaking of the insurers, but to the right of action of the insured. The furnishing of *any* proofs may be waived. *Taylor vs. Mechanics' Fire Insurance Co.*, 9 Howard, 403; 9 Casey, 397; *Owen vs. Farmers Insurance Co.*, 57 Barbour, 520; *Post vs. Ætna Insurance Co.*, 43 Barbour, 365; *Bumstead vs. Insurance Co.*, 12 New York, 81. 2. It is objected that the re-insurance clause means that the re-insurer will pay only what the primitive insurer pays, and evidence attempting to establish a usage to that

effect is adduced. The answer is, that the clause is susceptible of no such construction. The design is to regulate the proportions if the re-insurance is less than the insurance, and the loss is not total. Though the original insurer becomes insolvent, the re-insurer is not released from payment in full by reason thereof. *Herckenrath vs. American Insurance Co.*, 3 Barbour, 63; *Eagle Insurance Co. vs. Lafayette Insurance Co.*, 9 Indiana, 443; *Storm vs. Davenport*, 1 Sandford, 137. Hence the evidence is incompetent. *Mutual Insurance Co. vs. Hone*, 2 New York, 240. It was also insufficient. *The Schooner Reeside*, 2 Sumner, 567; *Adams vs. Otterbach*, 15 Howard, 539; *The Eddy*, 5 Wallace, 481.

BLODGETT, J.: The Lorillard Fire Insurance Company was a corporation created by and under the laws of the state of New York, for the purpose of doing insurance business. For some years prior to the 9th of October, 1871, it had an agency in the city of Chicago, at which a large amount of insurance business was transacted. In the due course of its business at Chicago said company had obtained from the Republic Insurance Company of Chicago policies of re-insurance on its insured interest in certain property here, amounting in the aggregate to $19,500, which policies of re-insurance were in force on the 9th of October, 1871, at which time a total loss of the property thus re-insured occurred.

In consequence of losses sustained by fire in this city on the 9th of October, 1871, the Lorillard Fire Insurance Company became insolvent, and by proceedings instituted in the Supreme Court of the state of New York, pursuant to the statute of that state, said Lorillard Fire Insurance Company was, on the 23d of October, 1871, dissolved, and Carlisle Norwood appointed receiver of all the estate, debts, credits, effects, and choses in action of said company.

The Republic Insurance Company was also rendered insolvent by the fire of October 9th, and has, within a few months past, been adjudged bankrupt by this court.

On the 27th of December last, said Norwood, as receiver of the Lorillard Insurance Company, filed with H. N. Hibbard, Esq., register in bankruptcy of this court, his proof of a claim against the estate of the Republic Insurance Company, growing out of said policies of re-insurance, to the amount of $19,500, which claim was allowed by the register. The assignee of the Republic Insurance Company subsequently appeared before the register and filed objections to said claim, and his petition that the same be re-examined under the thirty-fourth rule. Proofs were thereupon taken, both on the part of the assignee and receiver, and the issues raised thereon, together with the proofs, have been certified to the court for decision.

From this proof it appears that said Lorillard Fire Insurance Company had issued six policies, amounting in the aggregate to $30,000, on property in this city, on which it had obtained policies of re-insurance from the Republic Insurance Company to the amount of $19,500.

All the property thus insured and re-insured was totally destroyed by the great fire in this city of October 9th, 1871, and a total loss proven and adjusted as such to the full amount of the respective policies against the Lorillard Insurance Company. The receiver of the Lorillard has paid dividends to the holders of its policies thus re-insured to the amount of 85 per cent.

The proofs of loss by the policy holders were presented to the adjusters of the Lorillard Insurance Company in November and December, 1871, and the losses adjusted as total losses in each case. These original proofs were forwarded by the adjusters to the receiver, Mr. Norwood, at New York, and copies thereof were, early in March, 1872, furnished to the proper officers of the Republic Insurance Company.

No objections were made to the form or substance of these proofs, but the officers of the Republic insisted, at the time these copies of proofs were presented and at subsequent interviews with the receiver and his agents, that the Republic was not bound to pay any more or any faster than payment was

made by the receiver of the Lorillard, basing their refusal upon the clause in the policies of re-insurance which reads as follows: "Loss, if any, payable at the same time and *pro rata* with the assured." Some time after the fire several creditors of the Lorillard brought attachment suits in the Superior Court of Cook County against said company and said receiver, and garnished said Republic Insurance Company, which suits were subsequently removed into the United States Circuit Court in this district; but on the 19th of December last said suits were all dismissed by the respective plaintiffs therein, at their own costs—said suits having been dismissed in consequence of a ruling of the circuit court of this district upon the demurrer of plaintiffs to a plea by the defendant Norwood, alleging the dissolution of the Lorillard Fire Insurance Company by the Supreme Court of the state of New York.

The assignee of the Republic now urges eleven reasons or objections against the allowance of this claim, but they may all be grouped and considered under three heads.

First—That the receiver of the Lorillard Fire Insurance Company has no authority to collect or receive the assets of said company outside of the state of New York; that his functions are limited by the jurisdiction of the court from which he received his appointment.

Second—That the re-insured company, and the receiver who represents it, has failed to comply with the prerequisites and conditions of the policies, by giving notice and making proofs of loss in apt time as required by the terms of the policy.

Third—That, even if liable at all, the liability of the Republic Insurance Company is limited to the amount which the Lorillard has paid on its re-insured policies.

The first objection raised, questioning the capacity of a receiver appointed by a state court to act beyond the jurisdiction of such court, opens a wide field for inquiry into the rights and powers of officers acting under the authority of foreign courts, but I have not time to discuss at length the interesting class of questions suggested by this branch of the case.

There is much apparent authority in support of the position taken by the counsel for the assignee.

In *Booth vs. Clark*, 17 Howard, 322, the Supreme Court of the United States held very broadly that a receiver appointed under the authority of a state court, could not sue in the courts of another jurisdiction.

The same principle was enunciated, although not so elaborately discussed, in *Harrison vs. Strong*, 5 Cranch, 289, and *Ogden vs. Saunders*, 12 Wheaton, 359. But it will be noticed that in all these cases there was a struggle for the property of the estate between the officers of a foreign court and creditors who had acquired liens by attachment or other proceedings, in the jurisdiction where the property was situated. In *Booth vs. Clark*, 17 Howard, 322, the Supreme Court, after discussing the various English cases and tracing the history of the principle in question, in the English courts, comes to the conclusion that the rule of comity which authorized a receiver of a foreign court, or an assignee in bankruptcy appointed in a foreign jurisdiction, to prove a claim in an English court, had been repudiated and denied through a long series of years, but that after the adoption of a general bankrupt law in England, and the adoption of the same policy in several of the commercial countries of Europe, the rule of comity required that the English courts should recognize the rights of assignees in bankruptcy appointed by foreign jurisdiction—and such has been the rule in England since that time, as the Supreme Court say, "Such is not the rule in this country,"—(that is, was not at the time of the decisions referred to,) "because we have no general bankrupt law;" plainly, as it seems to me, indicating that the rule in this country would be changed if the principles of the bankrupt law should be infused into its commercial law—an event which has occurred since the decision of *Booth vs. Clark*.

To my mind there is, to say the least, a strong analogy between the right of the receiver in this case to prove the debt due the estate he represents, and the right of the executor or

administrator appointed in another state, to represent the right of a deceased creditor before this court and prove a debt due his testator or intestate, and such right has never been drawn in question.

Under authority of all the bankrupt laws which have been passed by the Congress of the United States, the practice has been uniform, so far as I can ascertain, to allow guardians, executors, administrators, and all persons acting in a representative capacity, to appear before the bankrupt court and prove the claims pertaining to the estate which they severally represent. If the bankruptcy proceedings in this case were pending before a United States court in the state of New York, there can be no doubt that such court would recognize the rights of the receiver in this case, and allow him to prove this claim. Why should a federal court of the state of New York recognize the authority of this receiver appointed under the laws of the state of New York, without any relation to the federal laws or the bankrupt law, any more than this court should? Do state lines make any difference? The federal courts take judicial notice of the laws of all the states and of the powers of all state officers, whether executive or judicial. It seems to me it would be applying a very narrow rule to the provisions of the bankrupt law and limit the usefulness of that statute very considerably, if the federal courts should require all executors, administrators, guardians of minors, or conservators of insane or idiotic persons, as a condition precedent to the proving of their claims against the estate of their debtors, to take out auxiliary or supplemental letters of administration or guardianship from the state courts, within the jurisdiction of the court where the bankruptcy proceedings were pending. The bankrupt law is national in its application. It is intended to serve all creditors alike, and gives all creditors acting in a representative capacity, resident out of the district as well as those within the district wherein the proceedings are pending, all the rights to prove their debts which natural persons might exercise, and it seems to me that this court would do gross

injustice to the principles of the law to hold that this receiver, clothed as he is with full powers by the laws of the state of New York to represent the estate of the Lorillard Insurance Company, and standing, by virtue of the decree of the Supreme Court of the state of New York in the shoes and place of the Lorillard Fire Insurance Company, should not be allowed to prove his debt here as fully as if he had been vested with those powers by virtue of a decree from any court within this district.

The bankruptcy law clothes the district courts, sitting as courts of bankruptcy, with all the powers of courts of equity. In several of the cases which have been cited in this case by the counsel for the assignee, reference is made to the hardship of the rule adopted in those cases, and it is suggested that a court of equity might afford a remedy where there was actual danger of injustice being done.

In most of those cases there was a struggle between resident and non-resident creditors—between the citizens of this country and citizens of foreign nations, as to who should have the benefit of assets found within the jurisdiction of our courts, and, by the application of a well known principle of international law, our courts have sustained our own creditors to the extent of the assets within our own boundaries. But anticipating that the application of this rule might work hardship and injury in many cases, the courts have intimated that it lay within the scope and powers of a court of equity to give relief where there was danger that the application of the rule might thus work injustice.

Inasmuch, then, as a court of bankruptcy, as I said before, is clothed with all the powers of a court of equity, it seems to me that even if this court did not feel itself justified in recognizing the authority of the receiver in this case, it would entertain a bill specially filed in the case setting up the authority under which the receiver was acting, and allow him, by special decree, the privilege of proving his claim.

But I do not deem it necessary, as I have already intimated,

that he should resort to that course. It seems to me that the equality of rights of all creditors under the bankrupt law—that principle of equality which runs through and forms the distinguishing characteristic of the bankrupt law—requires that bankruptcy courts shall recognize every person who represents by proper proceedings in the place where he receives his appointment, any creditor, and shall allow such representative to prove and recover his just claim.

There is no doubt—counsel admit it in their argument and in the briefs filed—but that if there had been a voluntary payment made to the receiver by the assignee in this case, such voluntary payment would be good, and the receipt of the receiver would be an acquittance of the debt. And I can comprehend no rule so salutary for the bankruptcy courts to adopt as to assume that any person who is authorized to give an acquittance of a debt, to receipt for a claim, is entitled to prove the debt in bankruptcy, if he be acting in a representative capacity, as trustee, assignee, receiver, executor, administrator, or in any other of the various representative capacities which the law provides for the administration of human affairs. Coming, then, to the conclusion that the receiver has a standing in this court, I dispose of the first objection raised by the assignee in this case, and hold that the assignee can rightfully prove the claim.

I now proceed, for a moment, to the discussion of the other objections which have been raised. The first is that proofs of loss were not furnished in apt time. The policies contained the usual provisions—that the assured shall, within a reasonable time, furnish the insurer with proofs of loss, and shall be subject to examination, etc.

The evidence shows that the persons holding the original policies issued by the Lorillard Insurance Company made their proofs of loss to the Lorillard Company; that those losses were adjusted by the Lorillard Company; that the proofs of loss were forwarded to the receiver, and that copies of those proofs of loss were furnished by him to the re-insuring company, the

Republic; that those copies were presented to the officers of the Republic Insurance Company some time in March, 1872, long prior to its going into bankruptcy, and demand made for the payment of the money.

At the time the proofs of loss were presented and the demand made for the payment upon the policies, the secretary of the Republic Insurance Company, Mr. Payson, who was the managing officer of that company at the time, said to the agent of the receiver, "You don't expect us to pay any faster than you pay, I suppose?" and some discussion arose between the agent of Mr. Norwood and Mr. Payson as to the obligation of the Republic Company under these policies of re-insurance; but no exception was taken to the form of proofs. No doubt was expressed but what the losses had accrued to the full extent claimed, nor was any objection taken to the substance or subject matter in the claim, further than to the fact that by reason of the peculiar phraseology of the re-insurance policy, the Republic Company was not bound to pay any faster than the Lorillard, nor any more. During all the discussions between the receiver and the officers of the Republic, which involved several interviews between the receiver himself and the officers of the company, and also several interviews between the agents of the receiver and the officers of the Republic, no objection to the form or substance of these proofs was ever taken.

On the contrary, the evidence shows that, to a considerable extent, if it be not the universal custom in this city, the practice and usage among insurance men, in the settlement of re-insurance policies, is to furnish the re-insuring company with copies, merely, of the original proofs of loss, and notice of the amount at which the loss has been adjusted.

The loss, of course, is settled usually by the company that issues the original policy. It is to that company that the assured looks for his indemnity. He makes his proof to the company whose policy he holds, and that company, if re-insured, after adjusting the loss, submits copies of the proof of loss to the company so re-insuring it.

How far that custom has ripened into a binding usage, I am not prepared to state, nor do I deem it necessary to decide it now, because I think this case can be disposed of upon well known principles of law governing the rights and obligations of insurance companies.

It is a well settled principle, that where a party insured presents notice of his loss, together with proof, or what purports to be proof, and evidence of the extent of the loss which he has sustained, and no objections are taken thereto, objections are held to be waived, and it seems to me that the clear and obvious duty of the officers of the Republic Insurance Company, if they had any doubt of the authenticity of the copies which were presented, was to demand that the original proofs be submitted to them. If they had any doubt, or had any suspicion that a fraudulent claim was being attempted to be forced upon them by means of assumed copies of original proofs, they could have demanded the originals. They could have investigated the genuineness of the signatures; they could have determined whether such losses had been adjusted in good faith, by an examination of genuine proofs of loss submitted by the policy holders.

They make no such claim. They do not question the extent of the obligations of the Lorillard Insurance Company under their policies, but simply stand upon their denial of their liability until the Lorillard has discharged its liability to its policy holders.

This case comes within that large class of cases of which the books are full, in relation to which the principle has been established that an insurance company, if it has objections to a claim, or to proof of a claim, must make them known to the policy holder in such time that they can be remedied, or else the objections will be considered as waived.

The policies in this case all contain the clause which I have already quoted, and upon which the third objection is based, "Loss, if any, payable at the same time and *pro rata* with the insured." The objection under consideration is of minor

importance, because the evidence shows that the Lorillard Company, or the receiver of the Lorillard Company, has already paid eighty-five per cent. of the adjusted losses against it, and has still assets in his hands.

But I do not think that the construction put upon this clause by the counsel for the assignee in this case is a proper one. It seems to me that the true meaning of this clause in the policies is this, that the re-insuring company stipulates that it shall not pay any more loss than the original company is liable for. "Loss, if any, payable at the same time and *pro rata* with the insured,"—that is, the re-insuring company is to have the benefit of any deductions by reason of other insurance or salvage, that the original company would have, and also to have the benefit of any time for delay or examination which the original company might claim, so that the liability of the re-insuring company shall be co-extensive only with the liability and not with the ability, so to speak, of the original company.

The original company may have re-insured for the purpose for which re-insurance is usually if not universally accomplished—for the purpose of supplying itself with a fund with which to meet its obligations. It may have placed its own funds entirely out of its control; it may have divided its capital among its stockholders, and may depend solely upon the re-insurance to make good its liability to policy holders.

The intention of this clause was to make the re-insuring company's liability co-extensive, and only co-extensive with the liability of the original insurance company.

For instance, suppose an insurance company in the city of Chicago wishes to go out of business. It has money enough to re-insure all its risks, and does so, and goes out of the insurance business. That company does not keep a fund on hand any longer for the purpose of meeting losses as they fall in, but depends upon its re-insurance.

Now, it is to my mind absurd to say, if a loss occurs on one of those re-insured policies, that the company primarily liable

is to have its claim against the re-insuring company limited by its ability to meet its obligations to its original policy holders. The very object of making the policy of re-insurance was to place the company in funds with which to make its policy holders whole, and that is defeated if the construction which is insisted upon by the assignee in this case is the true one.

The fair, liberal construction, it seems to me, of this clause, and the salutary one, is to assume that the true intent of it, the judicial meaning, is that the liability of the re-insuring company is to be no greater than that of the original company; that they are not to be compelled to pay any faster than the original company would be compelled to pay, that they are to have the benefit of any defense which the original company would have had. Any deduction—any equity—which the original company would have had against the original insured, is to inure to the benefit of the re-insuring company.

I am of opinion that the Republic is liable on these policies to the extent of the adjusted losses, even if the Lorillard had not paid a cent.

Entertaining these views, I cannot do otherwise than hold that the claim of the receiver, proven in this case, must stand, and that the objections of the assignee must be overruled.

The contract of re-insurance being one of indemnity, the re-insured should recover only for loss actually sustained. *Eagle Insurance Company vs. Lafayette Insurance Company*, 9 Indiana, 443; *Mutual Safety Insurance Company vs. Hone*, 2 Comstock, 235. This loss includes costs incurred in defending suits, if the re-insured does not, on notice, appear and attend to such suit. *Hastie vs. DePeyster*, 3 Caines, 190; *New York Central Insurance Company vs. Protection Insurance Company*, 20 Barbour, 468; *New York State Insurance Company vs. Protection Insurance Company*, 1 Story, 458.

It is held that in case of loss the re-insurer is bound to pay the amount for which he insured, without reference to the fact that the original insurer may be unable to pay in full, or may have obtained an abatement from the insured. 1 Emerigon Ch. 8, § 14.

The insurer may proceed at once against the re-insurer, or may await judgment by the insured. He need not pay the judgment first, but may recover all that the re-insurer has contracted to pay. *Home vs. Mutual Safety Insurance Company*, 1 Sandford, 137; *Herckenrath vs. American*

Insurance Company, 3 Barbour's Chancery R., 63. Chancellor Walworth, in this last case, thoroughly reviews the authorities.

The insurer must prove up the character and extent of his loss. *Yonkers Fire Insurance Company vs. Hoffman Fire Insurance Company*, 6 Robertson, 316; *Hastie vs. DePeyster*, 3 Caines, 190.

The insurer is bound to fulfill all the conditions of his re-insurance policy. *New York Central Insurance Company vs. National Protection Insurance Company*, 20 Barbour, 468.

Any benefit from salvage accrues to the re-insurer. *Delaware Insurance Company vs. Quaker City Insurance Company*, 3 Grant's Cases, 71.

As to priority of contract between the respective parties, consult, *Carrington vs. Commercial Insurance Company*, 1 Bosworth, 152; *Hastie vs. DePeyster*, 3 Caines, 190; *Herchenrath vs. American Mutual Insurance Company*, 3 Barbour's Chancery R., 63. [*Reporter.*

UPTON, Assignee, etc., vs. BURNHAM.

District Court—Northern District of Illinois—May Term, 1873.

In Bankruptcy.

1. Liability of Stockholder for Unpaid Balance.—Under the Illinois statute a stockholder is liable to the creditors of the company for any unpaid balance upon his stock.

2. Non-Assessable Stock.—Though the words "non-assessable" written across the face of the stock certificate might constitute a valid contract as against the company, they are not binding as against the assignee.

3. Substitution of Stockholder.—If the company accept as a stockholder a person to whom the stock has been transferred in blank, he then becomes liable as a stockholder.

4. Provision that Stock is Transferable only on Company's Books.—A provision that the stock is transferable only on the books of the company is for the company's protection, and a provision which they can waive, which they do by accepting such transferee. Entering his

name by the company upon their books is such waiver as estops them from claiming of the original stockholder.

5. ASSESSMENT BY COURT.—An order of the court requiring each stockholder to pay a call on his stock within a specified time, is binding upon all the stockholders, whether they receive actual notice or not.

6. INTEREST.—A stockholder is liable for interest on the call from the time it was payable.

This was an action on the case by Clark W. Upton, assignee of the Great Western Insurance Company, bankrupt, to recover eighty per cent. unpaid on $15,000 of stock held by the defendant.

The defendant claimed that though he was the equitable, he was not the legal owner of the stock, which he insisted had never been regularly transferred to him, and therefore he was not liable upon it.

The facts appear in the charge, and in the case of *Upton, assignee, etc., vs. Burnham, ante*, 431, and *Same vs. Hansbrough, ante*, 417.

Boutell & Waterman, for plaintiff.

Hitchcock, Dupee & Evarts, for defendant.

BLODGETT, J., charged the jury as follows: This suit is brought by the plaintiff, as assignee of the Great Western Insurance Company, to collect a balance of eighty per cent., alleged to be due upon stock in that company held by the defendant.

The undisputed evidence in the case seems to be this: The company issued to one M. F. Hale its certificate for one hundred and fifty shares, of $100 each, of its capital stock, upon which twenty per cent. has been paid, and eighty per cent. is unpaid, the certificate having the words "non-assessable" printed across its face. This stock thus issued to Hale was transferred to one Gunn, by indorsement in blank and delivery, and by Gunn it was transferred, in the same manner, to the present defendant, some time in the spring or early part of the summer of 1871.

The defendant did not present this certificate to the officers of the company for the purpose of having it transferred to him upon the books of the company. The by-laws of the company, it is conceded, required that the stock should be transferred upon the books of the company. About a month after the great fire in Chicago, in October, 1871, he called at the office of the company with the certificate in his possession, and while there, stating to the officers of the company that he held such a certificate, was asked to show it to the stock clerk, as he was called, and that clerk, upon the exhibition of the certificate to him by defendant, entered the name of the defendant as a stockholder upon the books of the company, taking a memorandum of this certificate, and describing it correctly upon the stock-books.

The charter and by-laws of the company, and various acts of the legislature of Illinois, in regard to the liability of the stockholders of this company, have been put in evidence before you, and they show as a matter of law and fact, that the stockholders of this company are liable for the payment of the eighty per cent. unpaid upon their stock where only twenty per cent. has been paid; or, in other words, that any stockholder is liable for any portion of the unpaid stock held by him.

It is not necessary that I should recapitulate these various items of proof, further than to state to you that they show, not only the power of the company to compel the stockholders to pay what is unpaid upon their stock, but also the duty of the stockholders so to do; and I instruct you as a matter of law, that notwithstanding the words "non-assessable," written or printed across the face of stock certificates issued by the company, still the stockholders are liable to assessment, and are liable to be compelled to pay whatever remains unpaid upon their stock whenever it becomes necessary that such payment should be made for the purpose of discharging the debts of the company. As between the company and its stockholders this contract or agreement, expressed upon

the face of the certificate, might be binding; but where necessity arises to collect the assets of the company for the purpose of discharging its liabilities, then the obligation of the stockholders to pay whatever remains unpaid arises.

In this case the company has been adjudicated a bankrupt, and large claims have been proved against it, and it becomes the duty of the assignee, as an officer of the court, to collect from the stockholders whatever remains unpaid.

The question in this case is whether this defendant was a stockholder at the time this suit was brought against him, or at the time this company was adjudicated a bankrupt (February 6th, 1872), so as to make him liable upon this certificate.

It is claimed, on the part of the defendant, that he never assented to the entry of his name upon the stock books of this company; that he never became a member of the corporation, and liable to assessment under its by-laws and charter; that he bought this stock upon the market with the intention of transferring it to some other person, as it had been transferred from the original holder to him, and that he has done no acts which make him liable to the company or its creditors.

I feel bound to instruct you, that if you find from the evidence that the company assented to or accepted the defendant as a stockholder, knowing that he was the owner of the stock in question, then he is liable to be called upon for the unpaid portion of that stock. The by-laws and regulations of the company which provide that the transfer of stock should be made only upon the company's books, were made by the company for its own protection, and is a condition which they could waive. It was for them to say whether they would waive it or not. So if it appears to you from the evidence that the company has assented to accept Mr. Burnham, the defendant in this case, as a stockholder, by placing his name upon the books, whether he requested them to do so or not, or whether he even assented, if they knew as a fact that he held stock, and the company assented to his becoming a stockholder by placing his name upon the stock books, such act is

a waiver by the company of the clause in the by-laws and certificate which required the transfer to be made only on the books, and from that time forward his liability as a stockholder is fixed.

I will further instruct you that the entry upon the books is evidence of waiver. And the entry of the defendant's name upon the books in place of the original stockholder's, is such an act as will bind the company, and estop it from collecting from the original stockholder.

I further instruct you that the entry of the defendant's name on the books of the company, he being at the time the acknowledged owner of the stock, is an act on the part of the company accepting the defendant as a stockholder. The holder of a stock certificate by assignment and blank transfer, becomes thereby clothed not only with all the rights, but with all the obligations of a stockholder.

The record evidence introduced shows that after the adjudication in bankruptcy the court made an order directing all the stockholders to pay the amount of the call made upon them within thirty days from the entry of the order. This order was entered on the 14th of July, and the evidence shows that notice was duly forwarded to each stockholder, notifying them of this call. Whether in all cases such notice was received or not, I do not deem material, because I instruct you that every stockholder in this company is bound to take notice of what the court does in winding up the affairs of the company. The order of the court was that all the stockholders should pay on or before the 15th of August.

If you find the defendant was a stockholder, in the light of the evidence and the instructions I have given, you will then compute the interest upon the unpaid portion of the stock, eighty per cent., held by him since the 15th of August, which will be the amount of the verdict.

I am asked to instruct the jury to find specially as follows: "The defendant asks that the jury be instructed to find specially, whether the defendant ever authorized or assented to

the transfer on the books of the company." As I do not deem this question material, I will not submit it for a special finding. Also, "whether the defendant waived a formal transfer, and whether there was any transfer so as to make him a stockholder." This is also deemed immaterial, and I decline to submit it for a special finding.

Verdict for the plaintiff for $12,552.

This case is now pending in the Supreme Court, on appeal.

It is held that one whose shares have been forfeited by the company for non-payment of calls, is not a stockholder, nor liable to the creditors of the company, even though the debt was contracted before the stock was forfeited. *Mills vs. Stewart*, 41 New York, 384.

The Court of Appeals of New York, in a case where there had been no legal transfer of the stock, and where the statute provided that stock should be transferred only in a certain manner, has lately held that such provisions are for the benefit of the company and may be waived, and that where an equitable transferee is recognized as the owner, he becomes the stockholder in place of the original owner. *Isham vs. Buckingham*, 49 New York, 216. [*Reporter.*

INDEX.

ACCIDENT INSURANCE.—*See* INSURANCE, 10–13.

ACKNOWLEDGMENT.

Defects in acknowledgment cannot be cured, and where the requirements of the statute in these respects have not been fulfilled, it cannot be cured by testimony *aliunde;* nor does the statute making instruments not acknowledged or proved according to law, notice to subsequent purchasers or creditors cure the defect. *Kenosha, etc. R. R. Co. vs. Sperry*, 309.

ADMINISTRATOR.—*See* EXECUTOR AND ADMINISTRATOR.

ADMIRALTY.

1. DIVISION OF DAMAGES.—Where a vessel was injured by the joint negligence of another vessel and a tug, the damages should be apportioned between them. *The Monitor and Hill*, 24,
2. MEASURE OF DAMAGES.—In estimating the damages, the expense of repairing the mast, and demurrage for the time lost, should be allowed. *Ib.*
3. The mast, as repaired, having stood the remainder of the season, and it not appearing but what it would have continued serviceable, the expense of putting in a new mast during the next winter cannot be recovered. *Ib.*
4. Where a steamer, stranded in the Mississippi river, employs another less powerful one to assist in getting her off, it is the duty of the former to see that there are no obstacles or dangers in the place where the proposed movement is to be made. *The Virginia*, 48.
5. Where by the joint efforts of both steamers, the stranded steamer is got off, the general direction and control of the movement being with her, she is liable for the loss of the other steamer, wrecked in the manœuver, and also for the services rendered. *Ib.*
6. The smaller steamer not having supplied the sole motive power, does not, under such circumstances, run the risks of salvage service. *Ib.*
7. DUTY OF MASTER AFTER STRANDING.—After a vessel is stranded there is still an obligation upon the master to take all possible care of the cargo. *The Ocean Wave*, 317.
8. Where a barge is made leaky by an effort to remove her from a sand bar, it is the first duty of the master to stop the leak, and secure the cargo from the flow of water. *Ib.*

ADMIRALTY—*Continued.*

9. A shipper should not be required to prove negligence on the part of a master until evidence is given tending to show that the injury complained of came within an excepted clause in the bill of lading. *Ib.*
10. What constitutes unavoidable dangers of the river. *Ib.*
11. A vessel propelled in whole or in part by steam, having complied with the act of February 28, 1871, and the rules of the Board of Supervising Inspectors, and the Secretary of the Treasury, by placing on board a register adopted by said Board and Secretary, which proved defective and insufficient, and required frequent repairs, is not liable to seizure for having in use an imperfect register. *The Lac La Belle*, 313.
12. By purchasing one of the registers approved by lawful authority, the requirements of the law were complied with. *Ib.*
13. LIBEL AGAINST DOMESTIC VESSEL.—Under the twelfth rule in admiralty, as amended by the Supreme Court at the December Term, 1871, a libel can be maintained for repairs and supplies furnished to a domestic vessel at the home port. *The Selt*, 344.
14. *Obiter*, the lien would only attach at the date of seizure. *Ib.*
15. MORTGAGEE MAY DEFEND.—In the absence of the owner, a mortgagee may be permitted to appear as claimant. *Ib.*
16. MEANING OF RULE 12.—The alteration of rule 12 was intended to place contracts for repairs and supplies for *all* vessels on an equality as to proceeding in admiralty, not to abrogate the distinction between a domestic contract and a maritime lien. The alteration applies to the character of the process to be used, not to the question of jurisdiction. *Ib.*
17. ADMIRALTY RULES.—The rules established by the Supreme Court are rules of practice, not of decision. *Ib.*
18. PURCHASE OF SUPPLIES IN FOREIGN STATE.—If the owner of a vessel orders necessary supplies in a port of another state, and the ship chandler charges them directly to the vessel, without any special arrangement for payment, he has a lien on the vessel therefor. *The Eclipse*, 99.
19. NOTE NOT A WAIVER OF LIEN.—A note taken for the amount of the supplies will not waive a maritime lien on a vessel unless so understood at the time. The note must, however, be returned or surrendered in court at the hearing. *Ib.*
20. The fact that the vessel is in a foreign port is *prima facie* evidence of a necessity for the credit of the vessel. *Ib.*
21. An insurance company is liable to the legal holder of a policy, though the person who procured it had, by mistake, ordered it cancelled. *Marsh vs. Northwestern National Ins. Co.* 351.
22. The fact that the premium had not been actually paid is no defense

ADMIRALTY—*Continued.*

against a *bona fide* holder. Mutual accounts have, in such case, the effect of payment. *Ib.*

23. A man who buys and ships for a firm in another city, whose funds are used, the profits or loss to be divided, and each shipment to be a distinct venture, is not a partner, and the firm can sustain a libel on a policy indorsed to them, without prejudice from his orders or mistakes. *Ib.*

24. DUTY OF CARRIER.—It is the duty of a carrier by water to provide a sea-worthy vessel. A barge for carrying wheat must be tight, strong and sound. *Kellogg vs. La Crosse, etc., Co.*, 496.

25. The carrier is bound to know the condition and strength of his vessel. *Ib.*

26. The leaking of a barge is notice of her unseaworthiness, and the carrier attempting to proceed on the voyage with her is liable for the loss of the cargo. *Ib.*

27. DELIVERY BY CARRIER—WHAT CONSTITUTES.—Where a cargo of wheat is shipped in bulk, to be delivered under a bill of lading to a consignee who has charge of an elevator at the port of destination, it is not a sufficient delivery to moor the barge at the dock of the elevator during bad weather, without notice to the consignee. *Germania Ins. Co. vs. La Crosse, etc., Co.*, 501.

28. CUSTOM.—An alleged custom so to moor barges, leaving them to be taken charge of by the elevator, does not discharge the carrier. *Ib.*

29. CONDITION OF CARGO.—The carrier must show satisfactorily that the cargo was in good order on arrival at its destination. *Ib.*

ASSESSMENT.—*See* BANKRUPTCY, 99–123—STOCKHOLDER, 5–25.

ASSIGNEE.—*See* BANKRUPTCY, 52–58, 65, 69–70, 151–3.

ATTORNEY.—*See* PRINCIPAL AND AGENT.

BAILMENT.—*See* COMMON CARRIER.

BANKRUPTCY.

1. NO JURISDICTION IF AMOUNT REDUCED BELOW THAT SPECIFIED IN THE ACT.—The District Court has no jurisdiction of an involuntary case in bankruptcy, unless it appears on the trial that the debtor, at that time, owes debts provable under the act exceeding the sum of three hundred dollars, and is indebted to the petitioning creditors in the amount of two hundred and fifty dollars. This is true even though the debtor, at the time of the filing of the petition, was indebted to exceed those sums. When his indebtedness, by subsequent payments, is reduced below those sums, the court loses jurisdiction. *In re Skelley*, 260.

2. DEBTOR MAY DISPROVE ALL MATERIAL ALLEGATIONS.—The latter clause of the forty-first section of the act was intended to allow the debtor to disprove on the trial all the material allegations of the petition. *Ib.*

BANKRUPTCY—*Continued.*

8. PAYMENTS—PROOF ALLOWED ON GENERAL DENIAL.—Payments made by the debtor to the petitioning creditors are material facts on the issue on denial of bankruptcy, and the debtor can introduce evidence of such payments without a special traverse of the amount of his indebtedness. *Ib.*
4. RECEIPT—WHEN WAIVER OF ACT OF BANKRUPTCY.—The receipt of such payments by the petitioning creditors to an amount sufficient to reduce this indebtedness below the minimum established by the act, must be considered as a waiver of the alleged act of bankruptcy. *Ib.*
5. COSTS CANNOT BE ADDED, TO GIVE JURISDICTION—NOR COUNSEL FEES.—The petitioning creditors cannot add the costs paid and incurred by them to their debt in order to raise it above the jurisdictional limit. Such costs are not a part of their debt. The debtor must owe them two hundred and fifty dollars or they have no right to make costs. Nor can the creditors add counsel fees to their debt. *Ib.*
6. WHEN COSTS ALLOWED AGAINST DEBTOR.—In this case, the respondent, having been guilty at the time of the filing of the petition, was ordered to pay all costs up to the time of filing his denial, except the docket fee. *Ib.*
7. INSURANCE COMPANY.—A fire insurance company is clearly within the scope and provisions of the bankrupt law. *In re Merchants Ins. Co.*, 162.
8. APPOINTMENT OF RECEIVER—ACT OF BANKRUPTCY.—The appointment by a state court of a receiver to take possession of the property and assets of the corporation is "a taking on legal process" within the meaning of the thirty-ninth section of the bankrupt act. *Ib.*
9. STATE PROCEEDINGS NO OBJECTION TO JURISDICTION.—It is not a valid objection to the jurisdiction of this court that the proceedings in the state court were in accordance with a general statute of the state, and part of its organic law, and that the state court had first obtained jurisdiction of the parties and subject matter. Such a construction would effectually defeat the operation of the bankrupt law. *Ib.*
10. Nor is it a valid objection that the state statute under which the proceedings were instituted is not an insolvent law. If the fact of insolvency exists, and the corporation is within the provisions of the bankrupt law, this court has exclusive jurisdiction, and the fact that the state law does not purport to relieve the bankrupt from its debts, cannot be urged as a reason why the state court should hold the assets and administer the estate. *Ib.*
11. JURISDICTION IN BANKRUPTCY EXCLUSIVE.—Though the proceedings in the state court may have been within its powers and jurisdiction,

BANKRUPTCY—*Continued.*

yet, when the fact of bankruptcy intervenes the exclusive jurisdiction of this court attaches. *Ib.*

12. INSOLVENT CORPORATION SHOULD FILE PETITION.—When the corporation found itself insolvent, it should have at once filed a voluntary petition in bankruptcy, and failure so to do, and acquiescence in the proceedings against it by the state court, is itself an act of bankruptcy. *Ib.*

13. PAYMENT OF GROUND RENT ACT OF BANKRUPTCY.—The payment by the corporation, when actually insolvent, of the rent necessary to preserve a valuable lease, is an act of bankruptcy; and although such payment was judicious and made in good faith, and such an act as would have been authorized by this court, these facts do not change the character of the act under the law. *Ib.*

14. MARRIED WOMEN—COMMON LAW RULE RELAXED.—The common law rule that a married woman cannot enter into a co-partnership, or make any valid contract, has been much relaxed, and the rule in equity now seems to be that she may hold, control, and dispose of her separate property, incur liabilities on the strength of it, and that it may be subjected to the payment of her debts contracted in or about the management, improvement, or purchase of such property. *In re Kinkead*, 405.

15. ILLINOIS RULE.—In Illinois, a married woman retains control of all the property, real or personal, which she had at the time of her marriage, or acquired thereafter from any person other than her husband, and may make contracts in regard to the same, which can be enforced either at law or in equity, to the same extent as if she were sole. *Ib.*

16. MAY ENGAGE IN TRADE.—She may also engage in trade with her husband's consent; and *it seems*, even without such consent, using her own property, and may bind herself by all contracts she makes in her business. *Ib.*

17. BE A PARTNER—EVEN WITH HUSBAND.—She may enter into a co-partnership, even with her husband. *Ib.*

18. CONTRIBUTE HER SHARE.—Where a man and his wife held themselves out to the world as partners in trade, it will be presumed, in the absence of proof, that she contributed her share of the capital, and that her time, skill, and earnings went into the business. *Ib.*

19. PARTNERSHIP CREDITORS FIRST PAID.—When, in such case, the firm become bankrupt, the partnership creditors are entitled to be paid out of the partnership assets in preference to an individual creditor of the husband. *Ib.*

20. MAY BE ADJUDGED BANKRUPT.—Such a partnership can be adjudged bankrupts, and *it seems*, the wife may also be individually adjudged bankrupt. *Ib.*

BANKRUPTCY—*Continued.*

21. A married woman may be a voluntary as well as an involuntary bankrupt. *In re Collins*, 415.

22. PETITION FOR REVIEW—PARTNER CAN FILE PETITION EVEN AFTER RECEIVER APPOINTED.—The bankrupt court has jurisdiction of a petition by one partner to have the firm declared bankrupts, even though proceedings are pending in a state court to wind up the partnership, and a receiver had been appointed who had taken possession of the assets. *In re Noonan*, 491.

23. NO ACT OF BANKRUPTCY NECESSARY.—Such a petition being voluntary as to him, it is not necessary that there should be an act of bankruptcy alleged. *Ib.*

24. JURISDICTION NOT ARRESTED BY DISSOLUTION.—A dissolution by the act of all or any of the partners does not put an end to the power of the bankrupt court. *Ib.*

25. So long as any unfinished business, debts, credits, or assets remain, the bankrupt court has jurisdiction, a proper case being made. *Ib.*

26. SUFFERING PROPERTY TO BE TAKEN.—Under section 39 of the Bankrupt Act it is not necessary that the debtor should be an actor in promoting the taking of his property; the suffering it to be taken is a violation of the act. *In re Heller*, 153.

27. It is the duty of an insolvent man, when sued, to take measures to secure the equal distribution of his property among his creditors; and if he makes no defense to the actions, does not notify his other creditors of such suits, nor do anything to prevent the obtaining a preference, he suffers his property to be taken within the meaning of that section. *Ib.*

28. When a debtor suffers an act which he might prevent, and the necessary consequence of which is to give a preference to certain creditors, the law presumes that he intended such result. *Ib.*

29. INSOLVENCY—A CONDITION OF FACT, NOT OF BELIEF.—To render a mortgage void under the thirty-fifth section of the Bankrupt Act it is not necessary that the debtor knew or believed himself insolvent. The section treats of insolvency as a condition of fact, not of belief, and with knowledge of which and its consequences he is chargeable in law. *Hall, Assignee, etc., vs. Wager*, 28.

30. It follows, as a logical sequence, that when a man insolvent in fact gives a mortgage to one existing creditor he does so with a view to give him a preference. *Ib.*

31. The bankrupt law of 1841, and the Massachusetts insolvent law and decisions commented upon. *Ib.*

32. THE ACT OF 1841 declares void preferences made by a party *contemplating* bankruptcy; the act of 1867 includes those made by a party *being insolvent*, and the decisions under the former act are not always applicable to the present statute. *Ib.*

33. CONSTRUCTION OF ACTS OF INSOLVENT.—The purpose of the act being

BANKRUPTCY—*Continued.*

to enforce the equal distribution of the estate, every act of an insolvent that tends to defeat that purpose should be construed strictly as against him, and courts should indulge every presumption permissible by the well settled rules of law to secure the full benefit of this cardinal principle of the law. *Ib.*

34. INSOLVENCY CONSTRUED ACCORDING TO PLACE.—The strict definition of insolvency usually given in commercial centers should not be applied in country places. A party should be held insolvent only when he fails to meet his debts according to the usages and customs of the place of his business—the rule should be in harmony with the general custom of the place. *Ib.*

35. If an insolvent give a mortgage to a creditor who has reasonable cause to believe him insolvent, the fraud upon the Bankruptcy Act is complete as to both. *Ib.*

36. ACTUAL BELIEF, BY CREDITOR, OF INSOLVENCY NOT NECESSARY.—The question as to the creditor is whether he "had reasonable cause to believe" the debtor insolvent—not what he *did* believe; the latter is immaterial. The creditor is not constituted the sole judge of the sufficiency of the evidence of his debtor's insolvency—that is for the court to determine, the security being attacked. *Ib.*

37. WHAT CONSTITUTES INSOLVENCY.—Where a debtor had, during two years paid off only a small portion of an overdue debt, had sold out the stock of goods for which the account was made, and transferred a part of the paper received therefor, had applied for extensions and been refused, had previously declined to execute a mortgage on the ground that it would injure his credit, and had been pressed by his different creditors — these facts constitute reasonable cause for belief of insolvency, and the creditor cannot escape from the consequences of knowledge of them. *Ib.*

38. INSOLVENT PARTNERS — TRUSTEES FOR FIRM CREDITORS. — When partners are in fact insolvent, they should be considered in equity as holding the partnership effects in trust for the benefit of the firm creditors, and cannot by a transfer of the interest of one to the other defeat this trust. *In re Cook and Gleason*, 122.

39. TRANSFER TO CO-PARTNER.—A sale by one partner to his co-partner, when the firm is insolvent and on the eve of bankruptcy, is presumptively fraudulent as to the firm creditors, and the courts should set it aside and distribute the property as firm property. *Ib.*

40. WHEN VOID.—The legal effect of such transfer being to change the order of payment and prefer certain creditors, the private creditors over the firm creditors, it would be void as creating a preference contrary to the provisions of section 35 of the Bankrupt Law. *Ib.*

41. SUSPENSION OF PAYMENT.—When a man enters the commercial community he assumes all the responsibilities attaching to his calling, and is bound to take care of his commercial paper, whether made

BANKRUPTCY—*Continued.*

before or after he commenced business, and whether given in connection with his business or not. Therefore, if his commercial paper, given before, but falling due after he engaged in business, is allowed to remain unpaid for fourteen days after maturity, he can be adjudged a bankrupt. *In re Carter*, 195.

42. NON-PAYMENT OF PAPER TO WHICH THERE IS A DEFENSE, NOT ACT OF BANKRUPTCY.—A man should not be adjudged bankrupt for non-payment of commercial paper if he has reasonable ground to believe that he is not liable upon it. *In re Munn*, 442.

43. PARTIES SHOULD BE REMITTED TO ORDINARY REMEDIES.—If he can satisfy the court that he has good reason for disputing his liability, especially where he is in fact solvent, and has paid all other just claims, this court should not entertain jurisdiction, but should turn the parties over to pursue the ordinary remedies. *Ib.*

44. TRANSFER TO CO-PARTNER NOT ACT OF BANKRUPTCY.—A transfer of firm property from one member of a solvent firm to another is not an act of bankruptcy within section 39 of the act. Such a transfer is not a fraud upon the creditors of the firm, nor does it hinder or delay them, or constitute a preference contrary to the provisions of the act. *Ib.*

45. SECRET PARTNERS.—In order to charge a secret partner for the debts of the firm, it is necessary to show that such debts were contracted in the name and business of the firm, or that he had an interest in the contract or profits. *Ib.*

46. Where the purchaser of a note did not know that there were any secret partners with the persons whose names appeared upon its face and for whose individual benefit it was given, and placed the proceeds to the credit of the holder, the secret partners would not be liable. *Ib.*

47. The fact that such purchaser afterwards proved his claim in bankruptcy against the signers of the note alone goes to show that he understood them alone to be liable, and discounted it upon their responsibility. *Ib.*

48. Where firms composed of different members were doing business under the same firm name, circumstances stated under which dormant partners may not be liable. *Ib.*

49. RESUMPTION OF PAYMENT.—Any creditor may avail himself of an act of bankruptcy committed by his debtor in the non-payment of any of his commercial paper, and a resumption of payment after the expiration of fourteen days does not cure the act unless the debtor's whole indebtedness is paid. *In re Ess and Clarendon*, 301.

50. Although the suspended paper, the non-payment of which constituted the act of bankruptcy, be taken up and paid before the filing of the petition, any creditor may still insist upon having the debtor

BANKRUPTCY—*Continued.*

adjudged a bankrupt, and his estate administered upon under the act. *Ib.*

51. SECRET PARTNER—WHEN LIABLE TO ADJUDICATION.—A secret partner, known to the petitioning creditors to be such at the time the indebtedness was incurred, and a guarantor on the commercial paper, the non-payment of which constituted the alleged acts of bankruptcy, may, although entirely solvent, and having personally committed no acts of bankruptcy, be adjudged a bankrupt, on petition filed against both partners. *Ib.*

52. RIGHT OF THE ASSIGNEE TO SUE IN ANY DISTRICT COURT.—A suit may be maintained by an assignee in bankruptcy to collect the assets of the bankrupt in any other District Court than that where the proceedings in bankruptcy are pending. *Goodall, Assignee, etc., vs. Tuttle*, 219.

53. The right of the assignee to sue in the other District Courts is not expressly conferred, but it may be held to be included in and implied from the grant "to collect the assets," as that power could not be otherwise made effectual. *Ib.*

54. Jurisdiction over debtors of the bankrupt not being obtained by the bankruptcy proceedings, such power must, in order to give full effect thereto, necessarily be held to extend to any district where a suit to collect the assets is necessary. *Ib.*

55. It must be held that Congress intended to provide for the complete administration of the bankruptcy system in the Federal courts, and as authority to entertain such suits is not given to the Circuit Courts, it must exist in the District Courts, or the jurisdiction be radically defective. *Ib.*

56. The second section relates exclusively to the jurisdiction of the Circuit Courts under the act, and its provisions cannot, therefore, properly be referred to, to limit the jurisdiction of the District Courts conferred by the first section. *Ib.*

57. The rule that a legislature, by adopting a statute of another state, or re-enacting an old statute, is presumed to have adopted the judicial construction given thereto, considered and authorities referred to. Cases under the bankrupt act of 1841 cited and approved. *Ib.*

58. Congress not possessing the power to require or compel the state tribunals to entertain suits in favor of an assignee for the collection of the assets of the bankrupt, the courts should not construe the Bankrupt Act in such a manner as to necessitate in its execution assistance beyond the constitutional power of Congress to provide. *Ib.*

59. Numerous recent cases cited and examined. *Ib.*

60. FRAUDULENT CONVEYANCE—INTENT OF BOTH PARTIES MUST APPEAR. To set aside a conveyance as made to hinder and defraud creditors

BANKRUPTCY—*Continued.*

the intention of both parties must be shown. *Jenkins, Assignee, vs. Einstein*, 128.

61. Testimony of witnesses as to the value of property at an anterior date commented upon. *Ib.*

62. INADEQUACY OF CONSIDERATION MUST BE GROSS.—To set aside a conveyance for inadequacy of consideration, the consideration must be *grossly* inadequate and such as to clearly indicate the existence of unfair dealing, fraud, imposition or oppression. *Ib.*

63. PURCHASE WITHOUT ABSTRACT OF TITLE.—The fact that an attorney, who thinks that he knows the title, has confidence in the vendor, and purchase without an abstract or examination of title, is not a proof of fraud. *Ib.*

64. USURY.—The fact that the negotiator of a loan, who personally guaranteed the paper, received a large compensation for so doing, does not vitiate a conveyance made to him in settlement of a part of the loan which he was afterwards compelled to take up. *Ib.*

65. *It seems*, that an assignee cannot set aside a transaction of the bankrupt on the ground of usury. *Ib.*

66. TRANSFER OF PROMISSORY NOTES.—The transfer of promissory notes by the payee during the pendency of bankruptcy proceedings against him, upon which he was afterwards adjudged a bankrupt, and of an injunction restraining him from disposing of his property, vests no title in the purchaser, even though he had no actual notice of the bankruptcy proceedings. *In re Lake*, 204.

67. WHO TO TAKE NOTICE OF PROCEEDINGS.—All the world is bound to take notice of proceedings in bankruptcy, and the purchaser takes with constructive notice. *Ib.*

68. ADJUDICATION RELATES BACK, ETC.—The adjudication of bankruptcy relates back to the time of filing the petition, and carries with it title to the assignee to all property and all interest in the property which the bankrupt had at that time; and the assignee can recover such notes from the purchasers. *Ib.*

69. PURCHASER RULED TO DELIVER WITH PROPER ASSIGNMENT.—This case is not within the rule that negotiable bills of exchange, which have been stolen, cannot be recovered from a *bona fide* holder, and the court will in such circumstances rule him to deliver them to the assignee. *Ib.*

70. SALE BY ASSIGNEE—WHEN JUDGMENT LIEN NOT DEVESTED.—Where an assignee petitions to sell real estate of the bankrupt, subject to certain specified liens, and it is so ordered, a sale by the assignee *free from all liens* does not devest the lien of a previous judgment creditor, no reference having been made in either the petition or order to any liens other than those specified. *In re McGilton*, 144.

71. EFFECT OF CONFIRMATION BY COURT.—If the report shows a sale free and clear of all incumbrances except those named, a simple

BANKRUPTCY—*Continued.*

confirmation by the court is not equivalent to an authority, and does not discharge such liens. To effect that it must expressly appear that knowledge of this excess of power exercised by the assignee was brought to the knowledge of the court, or that the *report* was ratified *as such*. *Ib.*

72. PRESENCE OF JUDGMENT CREDITOR—at the sale by his counsel, would not estop him, their being no authority to sell free and clear of his judgment. *Ib.*

73. HOW CREDITORS MAY PROCEED.—It is competent for the Court in Bankruptcy to authorize a creditor to proceed in the usual way to collect his debt, if that course seems best for the estate. *Ib.*

74. COVENANT TO INSURE.—A covenant in a mortgage to keep the mortgaged premises insured for the benefit of the mortgagee creates a specific equitable lien upon the insurance money, which is valid as against an assignee in bankruptcy. *In re Sands Ale Brewing Company*, 175.

75. The mortgage being recorded, the covenant acts upon the insurance as soon as effected, runs with the land, and is notice to creditors; and no subsequent assignment can affect the rights of the mortgagee. It is not necessary that the policies be specifically assigned nor that the mortgagee select the companies; and any acts of the mortgagor, without the consent of the mortgagee, will not defeat the effect of the covenant. *Ib.*

76. *It seems* that not even a specific assignment to a particular creditor would have avoided the effect of the covenant. *Ib.*

77. Where such covenant is made by a corporation, no subsequent change in the ownership of the stock can change its legal effect. *Ib.*

78. PURCHASER OF CLAIMS—WHEN MAY PROVE.—A party who in good faith purchases claims against a bankrupt, with the intention of stopping proceedings and giving him time, should not be deprived of participation in the estate. *In re Strachan*, 181.

79. To enable him to prove them, however, he should take an assignment. A simple receipt of payment is not sufficient. *Ib.*

80. DATE OF PROOF—INTEREST.—Such claims should be proven as of date of adjudication, but may draw interest to date of actual payment. *Ib.*

81. EFFORTS OF DEBTOR TO EXTRICATE HIMSELF.—The Bankrupt Act should not be so strictly construed as to prevent a debtor from making every effort to extricate himself from bankruptcy proceedings. *Ib.*

82. *The forms* prescribed in the General Rules are not binding, but may be altered to suit circumstances. *Ib.*

83. SURRENDER OF PREFERENCE.—A full surrender by a creditor of a preference, fraudulent under the act, restores him to all his rights,

BANKRUPTCY—*Continued.*

and he may prove his claim against the estate. *In re E. R. Stephens*, 187.

84. When must be Made.—Whether this may be done after suit is brought, is a matter of discretion with the court. It will not be allowed after a recovery. *Ib.*

85. There is no distinction in this respect between voluntary and involuntary bankruptcy. *Ib.*

86. Chattel Mortgage—When Fraudulent.—A chattel mortgage taken by a retiring partner on all the firm goods, including property to be afterwards acquired, and by agreement kept from the records, is fraudulent and void as to subsequent creditors of the continuing partner. *Ib.*

87. Transfer in Payment.—A transfer of the property to the retiring partner in payment of his mortgage can be set aside by the assignee, and the mortgagee will not, in such case, be allowed to prove his debt. *Ib.*

88. What Debts Retiring Partner may Prove.—For such partnership debts, however, as he may have paid or assumed he will be allowed to prove—he having, as partner, a right to contribution. *Ib.*

89. Mechanics' Lien under State Law—When Attaches.—The lien created by the statute of Wisconsin attaches from the time the building was commenced or the materials furnished. *In re Cook and Gleason*, 116.

90. Petition Filed by Leave.—A person claiming a lien should not proceed in the State Courts after petition in bankruptcy filed, without leave of this Court. The doing so is a contempt, and until discontinuance of such suits the claimants will not be protected by this Court. *Ib.*

91. Bankrupt Law Recognizes Liens.—The Bankrupt Act provides for the protection of legal liens against the bankrupt's estate, instead of destroying them; and where a party has a lien when the petition in bankruptcy is filed, the court in bankruptcy will adjudicate upon and protect it. *Ib*

92. How Far Good.—The lien is only good for the articles actually used in the building, or sold for such use. *Ib.*

93. On a contract not completed when petition was filed a *pro rata* allowance only should be made. *Ib.*

94. Parties having commenced suits in the state courts without such consent must discontinue them before they can be paid by the bankruptcy court. *Ib.*

95. Not for Work Due after Petition Filed.—For work done afterwards nothing should be allowed. Parties cannot thus create a lien upon property in the possession of the court. *Ib.*

96. Lien of Mechanic Relates Back.—Under the Mechanics' Lien Law of Wisconsin the liens relate back to the commencement of the

BANKRUPTCY—*Continued.*

building, without reference to the time when the work was actually done or materials furnished. *In re Hoyt*, 436.

97. PRIORITY.—Such liens take precedence of a mortgage given after the commencement of the work. *Ib.*

98. But as between mechanics there can be no priority. *Ib.*

99. POWER OF BANKRUPT COURT TO ASSESS STOCKHOLDERS.—This court has jurisdiction and power to make a call and assessment against the stockholders in a bankrupt insurance company, on stock held by them, but not paid up. It has all the powers of a court of equity in the premises. *In re Republic Ins. Co.*, 452.

100. The company, while solvent, having bought and retired a portion of its capital stock, this court will not go behind such action of the constituted authorities of the company. Such an act was within their general scope and power, and does not relieve the other stockholders from their liability to calls after the company has been declared bankrupt. *Ib.*

101. CLAUSE IN CHARTER DOES NOT LIMIT POWER OF COURT.—Although the charter of the company gives no right to make a call on the unpaid stock, except in case "of losses exceeding the means of the corporation," this clause should not be construed as limiting the right of the company or court to an assessment for payment of losses only. When the funds are exhausted by losses an assessment may be made, either to pay debts already contracted or to create a new fund for a business basis. The losses exceeding the means of the company, the liability of the stockholder on his unpaid stock becomes fixed, and whether the balance is to be applied in payment of losses or in payment of other liabilities and expenses does not affect the question. *Ib.*

102. This court also has power to make an assessment to return unearned premiums, and to pay all claims properly provable against the company, and also the expense of closing its affairs. *Ib.*

103. EQUALIZATION OF PAYMENTS.—The court also has jurisdiction of the equalization of payments between stockholders; and where part have paid more than their fair proportion, it can assess the others and adjust the account between them. *Ib.*

104. It can also, where equity requires it, allow interest on claims proven. *Ib.*

105. LIABILITY OF STOCKHOLDER—FORMAL TRANSFER ON BOOKS MAY BE WAIVED.—A provision in the by-laws of a corporation requiring transfers of its capital stock to be made upon its books may be waived by the company, and if waived at the request of a purchaser of the stock, or with his assent, he becomes a stockholder, and directly liable for future assessments. *Upton, Assignee, etc. vs. Burnham*, 431.

106. MUTUAL RECOGNITION MAY ESTABLISH RELATION OF STOCKHOLDER.—

BANKRUPTCY—*Continued.*

Slight evidence of mutual recognition of the relation of stockholder may establish the legal position and liability. *Ib.*

107. A purchaser of stock taking an assignment in blank may, nevertheless, be liable for future assessments. *Ib.*

108. LIABILITY OF STOCKHOLDER FOR UNPAID BALANCE.—Under the Illinois statute a stockholder is liable to the creditors of the company for any unpaid balance upon his stock. *Upton, Assignee, etc. vs. Burnham*, 520.

109. NON-ASSESSABLE STOCK.—Though the words "non-assessable" written across the face of the stock certificate might constitute a valid contract as against the company, they are not binding as against the assignee. *Ib.*

110. SUBSTITUTION OF STOCKHOLDER.—If the company accept as a stockholder a person to whom the stock has been transferred in blank, he then becomes liable as a stockholder. *Ib.*

111. PROVISION THAT STOCK IS TRANSFERABLE ONLY ON COMPANY'S BOOKS.—A provision that the stock is transferable only on the books of the company is for the company's protection, and a provision which they can waive, which they do by accepting such transferee. Entering his name by the company upon their books is such waiver as estops them from claiming of the original stockholder. *Ib.*

112. ASSESSMENT BY COURT.—An order of the court requiring each stockholder to pay a call on his stock within a specified time, is binding upon all the stockholders, whether they receive actual notice or not. *Ib.*

113. INTEREST.—A stockholder is liable for interest on the call from the time it was payable. *Ib.*

114. LIABILITY OF STOCKHOLDERS FOR UNPAID BALANCES.—In an action by the assignee of a corporation organized under the Illinois statutes, against a stockholder to recover the amount unpaid on his stock, it is not a sufficient defense that the corporate proceedings have not been strictly in accordance with the statute. *Upton, Assignee, etc. vs. Hansbrough*, 417.

115. INCREASE OF CAPITAL.—Where an insurance company has attempted to increase its capital and filed papers for that purpose, received subscriptions for and sold stock under such increase, and incurred liabilities upon policies of insurance bearing upon their face evidence of such increase, this is sufficient to constitute the company a corporation *de facto*, so that neither it nor its stockholders can object that it is not a corporation *de jure*. *Ib.*

116. STOCKHOLDER—WHEN ESTOPPED.—Where, to the public, a company had all the external *indicia* of being a corporation and legally entitled to exercise the rights and franchises it assumed, a person voluntarily taking stock in such company is not in a position, when

BANKRUPTCY—*Continued.*

sued for the balance due for such stock, for the benefit of creditors of the company, to deny the authority of the company to issue such stock, or his liability thereunder. *Ib.*

117. A provision in the charter requiring the corporation to take securities for their stock to a certain amount, does not prohibit it from afterwards selling stock upon other terms, or without security. *Ib.*

118. COURT MAY MAKE ASSESSMENT.—A provision in the subscription and the stock certificate that the balance was to be paid on the call of the directors *when ordered by a vote of a majority of the stockholders themselves*, does not prevent this power being effectually exercised by this court. *Ib.*

119. Though no assessment or call pursuant to the terms of the subscription was made before proceedings in bankruptcy, this court became vested with all the power and control previously vested in either the chartered officers of the company or stockholders, or both collectively. *Ib.*

120. FRAUD BY AGENTS.—The fact that the agents and officers of the company represented to the stockholders at the time of their purchase that no assessment would ever be made, and that the stock was in fact non-assessable, or made other false and fraudulent statements in regard to the condition of the company, are inadmissable as evidence, and constitute no defense as against the creditors of the company. *Ib.*

121. NOTICE DISCRETIONARY.—This court having the power to require the stockholders to pay the balance due on their stock, it is discretionary whether it shall exercise it without notice to the stockholders. At all events, in a suit by the assignee against a stockholder such order cannot be reviewed. *Ib.*

122. The fact that the call was for more than was necessary to pay the debts of the company can not be tried in an action against an individual stockholder. *Ib.*

123. RELEASE OF UNPAID BALANCE NOT BINDING.—A resolution passed by the directors of the corporation releasing the stockholders from the payment of balances unpaid upon the stock, in accordance with which the certificates of stock were stamped non-assessable, is not binding upon parties who had insured without knowledge of its existence. *Ib.*

124. PURCHASER OF STOCK LIABLE.—The purchaser of a certificate of stock who surrenders it and has one issued to himself, and his own name entered upon the stock books, becomes subrogated to the rights and assumes the liabilities of an original subscriber. *Ib.*

125. RIGHTS OF POLICY HOLDERS.—The terms and conditions of an insurance policy remain binding upon the insured after adjudication of bankruptcy to the same extent as before. The policy holder is bound by the terms of his contract. *In re Firemen's Ins. Co.*, 462.

BANKRUPTCY—*Continued.*

126. ASSIGNEE CANNOT WAIVE CONDITIONS.—Though an insurance company may, while solvent, waive the performance of conditions the assignee has no such power. *Ib.*

127. SHOULD EXAMINE PROOFS.—Even where proofs have been furnished and losses adjusted before adjudication, it is the right and duty of the assignee to examine and revise such proofs and adjustment, and to call for further proof if the claim is not clearly made out, or there is any evidence of lack of entire good faith. *Ib.*

128. YEAR CLAUSE—EFFECT OF PROOF OF DEBT.—A clause in a policy limiting the right of action to one year from the loss is valid as a limitation, but proof of the debt in bankruptcy is equivalent to the commencement of a suit. Failure or neglect to make such proof, or bring suit, however, within the time limited, bars the claim as effectually as failure to sue if the company were solvent. *Ib.*

129. ADJUSTMENT.—If the loss has been adjusted before the filing of the petition in bankruptcy, such adjustment is a settlement and a waiver of the limitation clause. *Ib.*

130. After such adjustment in good faith, the claim can be proven without regard to the limitation clause in the policy. *Ib.*

131. If, however, the proof was not submitted until after petition filed, the assignee cannot make an adjustment or agreement upon which an action can be maintained. *Ib.*

132. EFFECT OF WAIVER BY COMPANY.—A company while solvent may waive the proofs required by the policy, and where there is clear evidence of such waiver shown in the proof of debt in bankruptcy the debt should be allowed, subject to the right of the assignee to make inquiry into all the facts touching such alleged waiver. *Ib.*

133. If the assured shows such waiver regularly made in good faith by the company while it had the right so to do, the assignee should allow the claim, otherwise not. *Ib.*

134. CONTESTED CLAIM—PRACTICE.—The proper practice where the assignee wishes to contest any claim of the above classes is to ask that the claim be expunged under the 34th rule in bankruptcy. *Ib.*

135. FOREIGN RECEIVER MAY PROVE DEBT.—The receiver of a bankrupt corporation in another state can prove a debt against a bankrupt in this court. *Ex parte Norwood*, 504.

136. Any person authorized to give an acquittance of a debt is entitled to prove that debt in bankruptcy. *Ib.*

137. WAIVER OF TIME IN MAKING PROOFS.—Where an insurance company furnished copies of the proofs of loss to a re-insuring company, and no objection was made to their form or substance, the company thereby waives the right to object that they were not furnished in apt time. *Ib.*

138. Objections to proofs of loss must be made by the company on their

BANKRUPTCY—*Continued.*

presentation, or within a reasonable time thereafter, or they will be considered as waived *Ib.*

139. LIABILITY OF RE-INSURER.—A clause in the policy of re-insurance, "loss, if any, payable at the same time and *pro rata* with the insured," merely gives the company the benefit of any defense, deduction, or equity which the first insurer may have, making the liability of the re-insurer the same as the original insurer. It does not limit such liability to what the original insurer may have paid or be able to pay. *Ib.*

140. FRAUDULENT HOMESTEAD.—An insolvent merchant, having sold his homestead for cash, cannot by moving his family into his store, hold that as his homestead, exempt. *In re Wright*, 359.

141. Though his right to sell his homestead is undoubted, he cannot shift it, to the prejudice of his creditors. *Ib.*

142. In such case the court will order a delivery of possession to the assignee. *Ib.*

143. FIFTY PER CENT. CLAUSE.—Since the amendment of July 27, 1868, a bankrupt is entitled to his discharge, without the assent of his creditors, if his gross assets equal fifty per cent. of the debts proved, without deducting costs or expenses. *In re Kahley*, 169.

144. The intention of Congress in making this amendment clearly was to make the term assets as comprehensive as estate, and relieve the debtor from the costs and expenses of the proceedings. *Ib.*

145. Several cases commented on and criticised. *Ib.*

146. SET-OFF.—A claim for loss under an insurance policy may be set-off by the insured against his indebtedness to the company. *Drake vs. Rollo, Assignee, etc.*, 273.

147. MUTUALITY.—Such claims constitute mutual debts or credits within the meaning of the twentieth section of the Bankrupt Act. *Ib.*

148. The rights of the parties are to be determined by the state of facts at the time of the loss. *Ib.*

149. Though such set-off gives the complainant a preference, it results from the business relations of the parties as they stood at the time of the loss. *Ib.*

150. DEBT NOT DUE.—If his indebtedness is not due and the company is bankrupt, a bill in equity will lie to establish the set-off. *Ib.*

151. ASSIGNEE—MUTUALITY.—The assignee of a claim against an insolvent insurance company for loss under its policies, after notice of insolvency, cannot set it off against his previous indebtedness to the company. The debts and credits are not mutual under the 20th section of the Bankrupt Act. *Hitchcock vs. Rollo, Assignee, etc.*, 276.

152. Such a set-off would be unjust and inequitable. *Ib.*

153. RULE IN EQUITY.—Though courts of equity follow the law in allow-

BANKRUPTCY—*Continued.*

ing or refusing set-off, special circumstances may control the equity. *Ib.*

154. An assignee of a claim seeking to establish a set-off should show, not merely that he is the nominal owner of the claim, but that he has good equitable grounds for relief. *Ib.*

155. PURCHASED CLAIMS.—*It seems*, that a debtor to an insurance company might set-off a claim purchased before the filing of the petition, in good faith and for value, if without notice of the insolvency of the company. *Ib.*

156. TWENTIETH SECTION BANKRUPT ACT CONSTRUED.—A court of equity should construe the 20th section of the Bankrupt Act in furtherance of the main purpose of the law, and not permit a trick of one creditor to operate so as to give him payment in full to the sacrifice of the claims of the other creditors. *Ib.*

157. The language of that section does not foreclose a court of equity from disallowing a set-off when it would work injustice. *Ib.*

BILL OF LADING.

1. LIMITATION BY CARRIER OF COMMON LAW LIABILITY.—A common carrier may, by special contract, limit his common law liability in case of fire. *Van Schaack vs. Northern Transportation Co.*, 394.

2. For this purpose it is sufficient that bills of lading containing such exemption be delivered to the agent or person bringing the goods, or placed in a box from which they were accustomed to obtain bills of lading for shipments from time to time made. *Ib.*

3. In such case the burden is upon the plaintiffs to show that they were not barred by the bill of lading. *Ib.*

BOARD OF SUPERVISORS.—*See* MUNICIPAL BONDS.

BOATS AND VESSELS.—*See* ADMIRALTY.

BONA FIDE PURCHASER.—*See* BANKRUPTCY, 66–68, 78–79.

BONDS.—*See* MUNICIPAL BONDS.

BURDEN OF PROOF.—*See* COMMON CARRIER, 1-3.

BURNT RECORDS.—*See* PRACTICE, 1.

CAPITAL STOCK.—*See* STOCKHOLDER.

CARRIER.—*See* COMMON CARRIER.

CHATTEL MORTGAGE.

WHEN FRAUDULENT IN BANKRUPTCY.—A chattel mortgage taken by a retiring partner on all the firm goods, including property to be afterwards acquired, and by agreement kept from the records, is fraudulent and void as to subsequent creditors of the continuing partner. *In re E. R. Stephens*, 187.

COMMON CARRIER.—*See* INSURANCE—ADMIRALTY.

1. LIMITATION OF COMMON LAW LIABILITY.—A common carrier may,

COMMON CARRIER—*Continued.*

by special contract, limit his common law liability in case of fire. *Van Schaack vs. Northern Transportation Co.*, 394.

2. For this purpose it is sufficient that bills of lading containing such exemption be delivered to the agent or person bringing the goods, or placed in a box from which they were accustomed to obtain bills of lading for shipments from time to time made. *Ib.*
3. In such case the burden is upon the plaintiffs to show that they were not barred by the bill of lading. *Ib.*
4. DUTY AS TO VESSEL.—It is the duty of a carrier by water to provide a seaworthy vessel. A barge for carrying wheat must be tight strong and sound. *Kellogg vs. La Crosse, etc., Co.*, 496.
5. The carrier is bound to know the condition and strength of his vessel. *Ib.*
6. The leaking of a barge is notice of her unseaworthiness, and the carrier attempting to proceed on the voyage with her is liable for the loss of the cargo. *Ib.*
7. DELIVERY BY CARRIER—WHAT CONSTITUTES.—Where a cargo of wheat is shipped in bulk, to be delivered under a bill of lading to a consignee who has charge of an elevator at the port of destination, it is not a sufficient delivery to moor the barge at the dock of the elevator during bad weather, without notice to the consignee. *Germania Ins. Co. vs. La Crosse, etc., Co.*, 501.
8. CUSTOM.—An alleged custom so to moor barges, leaving them to be taken charge of by the elevator, does not discharge the carrier. *Ib.*
9. CONDITION OF CARGO.—The carrier must show satisfactorily that the cargo was in good order on arrival at its destination. *Ib.*

CONDEMNATION.

1. A proceeding under an act of Congress to condemn property is a "suit of a civil nature at common law or in equity," within the meaning of the Judiciary Act. *United States vs. Block* 121, 208.
2. JUDICIARY ACT—JURISDICTION OF FEDERAL COURTS EXTENDS TO SUBSEQUENT CASES.—The construction of that clause cannot be limited to such suits as were known at the time of the passage of the act. Whenever an act is passed which authorizes the commencement of a suit, jurisdiction of the case is thereby vested in the Federal courts, if the character of the parties warrants it, and it comes within the meaning of the statute. The grant of power in this act is prospective. *Ib.*
3. JURISDICTION NOT RESTRICTED TO OLD FORMS.—The clause, "suits of a civil nature at common law or in equity," was used in contradistinction to admiralty and criminal cases. It does not restrict the jurisdiction to old and settled forms, but includes all suits in which legal rights are to be ascertained and determined. *Ib.*
4. EXTENDS TO CONDEMNATION ACCORDING TO STATE STATUTE.—Congress has power to clothe the Federal courts with authority to pro-

CONDEMNATION—*Continued.*

ceed for the condemnation of property in conformity with a particular State statute. *Ib.*

5. ACT OF DECEMBER 21ST, 1871.—It was the intention of Congress in this act to give this court jurisdiction of the condemnation proceedings therein contemplated. *Ib.*
6. CONFLICTING CLAIMANTS.—Though the officers of the Government had stated to the owners of the ground the price which the Government was willing to give, yet if other parties had liens and claims against the property, which they were not willing to surrender, condemnation proceedings are necessary. *Ib.*
7. PROCEEDINGS—BY WHOM INSTITUTED.—The Secretary of the Treasury being the mere officer of the Government, when proceedings are instituted by him under a special law they become necessarily proceedings on the part of the United States; and although the petition be filed by the district attorney, it is within not only the spirit but the letter of the acts of Congress. *Ib.*

CONFLICT OF JURISDICTION.—*See* BANKRUPTCY, 9–11, 89–91.

CONSIDERATION.—*See* BANKRUPTCY, 61, 62.

CONSTITUTIONAL LAW.—*See* REAL ESTATE, 3, 4.

1. MILITARY COMMISSIONS—WHEN UNCONSTITUTIONAL.—Military commissions and their acts, during the civil war, in states where the courts were undisturbed, were unconstitutional. *Milligan vs. Hovey*, 13.
2. LIABILITY OF MEMBERS AND OF ARMY OFFICERS.—The member of such commissions, and officers of the United States army, are liable for arrest and imprisonment ordered by them in such states, even though ratified and approved by the Executive Department of the Government. *Ib.*
3. They are also liable for imprisonment suffered beyond their jurisdiction, if such imprisonment was the natural and necessary result of the sentence pronounced by them. *Ib.*
4. LIMITATION OF ACTION.—The limitation imposed by the act of Congress of March 3, 1863, was within the power of Congress, and binding upon state tribunals. *Ib.*
5. The defendants are not liable for any acts, nor any portion of the term of imprisonment, prior to two years before the commencement of the action; the statute begins to run notwithstanding that the imprisonment was a continued act. *Ib.*
6. *It seems* that an act of Congress would not be complete justification if the trial by a military commission was forbidden by the Constitution. *Ib.*
7. DAMAGES.—The damages to be allowed should be compensatory, and not exemplary or punitive. *Ib.*
8. The action of military commissions and duties of army officers commented on. *Ib.*

CORPORATIONS.

1. A corporation is included in the word "person," in the act of April 20th, 1871. *Northwestern Fertilising Co. vs. Town of Hyde Park*, 480.
2. The fact that persons hold their rights or property under the name of a corporation does not deprive them of the right and remedies conferred by law and the constitution. *Ib.*
3. Where the statute gives a remedy for a wrong if done *by* a corporation, the same right is given if the wrong is done *to* the corporation. *Ib.*

COUNTY BONDS.—*See* MUNICIPAL BONDS.

COVENANT TO INSURE.—*See* INSURANCE.

CUSTOM.—*See* COMMON CARRIER, 8.

DAMAGES.

1. The damages to be allowed for imprisonment by government officers, during a state of war, should be compensatory, and not exemplary or punitive. *Milligan vs. Hovey*, 13.
2. In an action against a railroad company, for personal injuries, the jury can only give as damages compensation for the injury, and cannot add anything by way of punishing the defendant. *Seymour vs. C., B. and Q. R. R. Co.*, 43.

DANGERS OF NAVIGATION.—*See* ADMIRALTY, 1–10, 24–26.

DEBTOR AND CREDITOR.—*See* BANKRUPTCY, 146–156.

DECREE.—*See* JUDGMENT AND DECREE.

DEDICATION.

1. DEDICATION BY PLATTING.—The owner of land, or his authorized agent, can plat and lay out a town so as to pass to the public the perpetual use of portions of the land for streets and public grounds, and when such plat is made out, acknowledged and recorded, in conformity with the statute, it operates as a sufficient conveyance of the streets and public grounds to the public use. *Nelson vs. City of Madison*, 244.
2. PLAT RECORDED IN WRONG COUNTY.—A plat made out and recorded in a different county from where the land is situate does not operate as a dedication. *Ib.*
3. PLAT MUST BE BY OWNER.—The plat must be made by the person who owns the land at the time it is made, or his authorized agent; and in order to divest the title of the proprietor, the formalities prescribed in the statute are essential. *Ib.*
4. Deeds referring to a plat, but given before the grantor acquired title, do not bind him as an act of dedication.
5. But an unequivocal recognition of the map after purchase would operate as an affirmance of the original intention of dedication, and give it full force and effect. *Ib.*
6. EVIDENCE OF DEDICATION BY PRESCRIPTION.—Though dedication

DEDICATION—*Continued.*

may be established by user for a period of twenty years, such user, in order to constitute a dedication by prescription, must have been adverse under some real or pretended claim or right, and exclusive. In the absence of proof to the contrary, the presumption is that the user was permissive. *Ib.*

7. Various decisions of the Supreme Court of Wisconsin and of the United States cited and commented on, this court following the latter. *Ib.*
8. Circumstances constituting a dedication — effect of user and acquiescence. *Ib.*

DELIVERY.—*See* COMMON CARRIER.

DISCHARGE.—*See* BANKRUPTCY, 143–144.

DOMESTIC VESSELS.—*See* ADMIRALTY.

EMINENT DOMAIN.—*See* CONDEMNATION.

EQUITY.—*See* BANKRUPTCY, 14, 146–156.

ESTOPPEL.

1. The doctrine of estoppel does not go so far as to preclude a further inquiry and a rehearing of a motion upon an enlarged state of facts, nor prevent this court from revising an order made in the case while pending in the United States Circuit Court for the district from which it had been removed. *Akerly vs. Vilas*, 332.
2. The doctrine of *res adjudicata* considered. *Ib.*
3. DISTILLER—WHEN ESTOPPED.—The Government having prescribed the terms upon which a person can engage in the business of distilling, a person having accepted those terms and entered upon the business cannot afterwards question their binding force. *Nusbaum vs. Emery*, 469.
4. As against a *bona fide* holder of bonds bearing upon their face the recital that they were issued according to law, it is not a sufficient defense that certain conditions have not been complied with. The town is estopped by the recitals. *Portsmouth Savings Bank vs. Town of Yellow Head*, 474.

EVIDENCE.—*See* DEDICATION.

EXECUTOR AND ADMINISTRATOR.

1. An administrator who has bid in in his own name property on the foreclosure of a mortgage belonging to his intestate, holds the same for the benefit of the heirs, and cannot sell the same without authority of the court. *Rafferty vs. Mallory*, 362.
2. An owner of land is bound by all recitals in his chain of title, and where in a deed made by such administrator he conveys in that capacity, a purchaser receives the title with full knowledge of the trust. *Ib.*
3. Such purchaser acquires no title, and the heirs at law can recover the property. *Ib.*

FORECLOSURE.

1. By Scire Facias.—Under the statute of Illinois, *scire facias* does not lie to foreclose a mortgage not duly acknowledged. *Kenosha, etc., R. R. Co. vs. Sperry*, 309.
2. The statute only applies to mortgages "duly executed and recorded." *Ib.*
3. Defects in acknowledgment cannot be cured, and where the requirements of the statute in these respects have not been fulfilled, it cannot be cured by testimony *aliunde;* nor does the statute making instruments not acknowledged or proved according to law, notice to subsequent purchasers or creditors cure the defect. *Ib.*

FRAUD.—*See* Bankruptcy, 62, 83–85, 120, 156.

FRAUDULENT CONVEYANCE.

1. Fraudulent Conveyance—Intent of both Parties must Appear.—To set aside a conveyance as made to hinder and defraud creditors the intention of both parties must be shown. *Jenkins, Assignee, vs. Einstein*, 128.
2. The testimony of witnesses as to the value of property at an anterior date commented upon. *Ib.*
3. Inadequacy of Consideration must be Gross.—To set aside a conveyance for inadequacy of consideration, the consideration must be *grossly* inadequate and such as to clearly indicate the existence of unfair dealing, fraud, imposition or oppression. *Ib.*
4. Purchase without Abstract of Title.—The fact that an attorney, who thinks that he knows the title, has confidence in the vendor, and purchases without an abstract or examination of title, is not a proof of fraud. *Ib.*
5. Usury.—The fact that the negotiator of a loan, who personally guaranteed the paper, received a large compensation for so doing, does not vitiate a conveyance made to him in settlement of a part of the loan which he was afterwards compelled to take up. *Ib.*
6. *It seems* that an assignee cannot set aside a transaction of the bankrupt on the ground of usury. *Ib.*
7. Sale to Attorney—When Valid.—To set aside a conveyance made, by a party in embarrassed circumstances to his attorney, it must be shown that he had been consulted in regard to the particular transaction, or that he was in a position to take an unfair advantage. *Ib.*
8. The fact that their relations were intimate, and that the vendor expected to be able to re-purchase on favorable terms, does not make the conveyance a simple security for indebtedness. *Ib.*
9. Depreciated Notes.—The fact that a part of the consideration was the paper of the firm to which vendor belongs, which was then only worth a part of its face, does not, at common law, vitiate the transaction. *Ib.*
10. Loose Conversations.—Loose conversations or statements should

FRAUDULENT CONVEYANCE—*Continued.*

not be allowed to change the character of a conveyance, and subsequent parol promises by the vendee to give the vendor the advance in the property, and offers to convey to any one who would take it off his hands, are without consideration, and cannot be enforced either in law or equity. *Ib,*

HOMESTEAD.—*See* BANKRUPTCY, 140, 142.

HUSBAND AND WIFE.—*See* MARRIED WOMEN.

INJUNCTION.

1. JURISDICTION.—The United States Courts have not jurisdiction to restrain a sheriff from selling under an execution issued from a State Court. *Ruggles vs. Simonton,* 325.
2. The State Court having first obtained jurisdiction of the property, its control is exclusive of this Court. Other claimants must try their rights in that tribunal. *Ib.*
3. This rule does not apply to proceedings against bankrupts, which rest upon different grounds. *Ib.*

INNOCENT PURCHASER.—*See* BANKRUPTCY, 65.

INSOLVENCY.—*See* BANKRUPTCY.

INSURANCE.

1. COVENANT TO INSURE.—A covenant in a mortgage to keep the mortgaged premises insured for the benefit of the mortgagee creates a specific equitable lien upon the insurance money, which is valid as against an assignee in bankruptcy. *In re Sands Ale Brewing Co.,* 175.
2. The mortgage being recorded, the covenant acts upon the insurance as soon as effected, runs with the land, and is notice to creditors; and no subsequent assignment can affect the rights of the mortgagee. It is not necessary that the policies be specifically assigned, nor that the mortgagee select the companies. And any acts of the mortgagor without the consent of the mortgagee will not defeat the effect of the covenant. *Ib.*
3. *It seems* that not even a specific assignment to a particular creditor would have avoided the effect of the covenant. *Ib.*
4. Where such covenant is made by a corporation, no subsequent change in the ownership of the stock can change its legal effect. *Ib.*
5. An insurance company is liable to the legal holder of a policy, though the person who procured it had, by mistake, ordered it cancelled. *Marsh vs. Northwestern National Ins. Co.,* 351.
6. The fact that the premium had not been actually paid in is no defense against a *bona fide* holder. Mutual accounts have, in such case, the effect of payment. *Ib.*
7. WAIVER OF TIME IN MAKING PROOFS.—Where an insurance company furnished copies of the proofs of loss to a re-insuring company, and no objection was made to their form or substance, the

INSURANCE—*Continued.*

company thereby waives the right to object that they were not furnished in apt time. *Ex parte Norwood*, 504.

8. Objections to proofs of loss must be made by the company on their presentation, or within a reasonable time thereafter, or they will be considered as waived. *Ib.*

9. LIABILITY OF RE-INSURER.—A clause in the policy of re-insurance "loss, if any, payable at the same time and *pro rata* with the insured," merely gives the company the benefit of any defense, deduction, or equity which the first insurer may have, making the liability of the re-insurer the same as the original insurer. It does not limit such liability to what the original insurer may have paid or be able to pay. *Ib.*

10. ACCIDENT INSURANCE—POLICY EXTENDS TO ACCIDENTS WHILE GETTING OFF THE CARS.—Under a clause in an accident insurance policy limiting the liability to an accident received by the defendant "while actually traveling in a public conveyance provided by common carriers, and in compliance with all rules and regulations of such carriers," a recovery can be had for an accident happening while getting on or off the train. *Tooley vs. Railway Passenger Assurance Co.*, 399.

11. INSURED ONLY BOUND TO KNOW GENERAL RULES.—Nor is the insured bound to examine the time card or ascertain all the *minutiæ* connected with the management of trains, but only such rules as a general traveler might be presumed, and ought to know. *Ib.*

12. If he attempts to get on a train after it has reached his destination, he does so at his own risk. *Ib.*

13. General rules of negligence stated. *Ib.*

INTEREST.—*See* USURY, BANKRUPTCY, 80, 113.

JUDGMENT AND DECREE.

1. The original judgment or decree of a court having jurisdiction cannot be disturbed in a co-ordinate tribunal, nor in a collateral action. *Amory vs. Amory*, 266.

2. The decree of a state court having jurisdiction of a suit and of the parties, is conclusive of the matters determined, and cannot be impeached in the courts of the United States, nor of another state. *Ib.*

3. The circuit courts of the United States are not constituted to review and reverse the proceedings and judgments of state courts. It is the duty of such courts to give full faith and credit to the judicial proceedings and records of state tribunals. *Ib.*

4. INTERLOCUTORY ORDERS MAY BE REVISED.—The decision of a court upon a motion does not partake of the quality of a judgment in such a sense as to preclude the same court from a further examination of the same question. The proceedings before judgment are within its control, and orders made may be revised, and vacated or set aside. *Akerly vs. Vilas*, 332.

JURISDICTION.—*See* BANKRUPTCY, 1-11, 22-25, 52-56—ADMIRALTY, 13, 15.

1. NO JURISDICTION BY STIPULATION.—The United States Circuit Court will not entertain jurisdiction of a case brought up by stipulation of parties from the state court, unless the records show the existence of the facts contemplated by the acts of Congress concerning removals from state courts. *Kingsbury vs. Kingsbury*, 60.
2. JURISDICTION OF FEDERAL COURTS.—Under the fifty-seventh section of the National Currency Act of June 2, 1864, suits may be maintained *by*, as well as against, national banks, in the United States courts of the district of their location. *Union National Bank vs. City of Chicago*, 82.
3. The United States courts have not jurisdiction to restrain a sheriff from selling under an execution issued from a state court. *Ruggles vs. Simonton*, 325.
4. The state court having first obtained jurisdiction of the property, its control is exclusive of this court. Other claimants must try their rights in that tribunal. *Ib.*
5. This rule does not apply to proceedings against bankrupts, which rest upon different grounds. *Ib.*
6. A corporation is included in the word "person" in the act of April 20, 1871. *Northwestern Fertilizing Co. vs. Town of Hyde Park*, 480.
7. The fact that persons hold their rights or property under the name of corporation does not deprive them of the rights and remedies conferred by law and the constitution. *Ib.*
8. Where the statute gives a remedy for a wrong if done *by* a corporation, the same right is given if the wrong is done *to* the corporation. *Ib.*
9. CONDEMNATION.—A proceeding under an act of Congress to condemn property is a "suit of a civil nature at common law or in equity," within the meaning of the Judiciary Act. *United States vs. Block* 121, 208.
10. JUDICIARY ACT—JURISDICTION OF FEDERAL COURTS EXTENDS TO SUBSEQUENT CASES.—The construction of that clause cannot be limited to such suits as were known at the time of the passage of the act. Whenever an act is passed which authorizes the commencement of a suit, jurisdiction of the case is thereby vested in the Federal courts, if the character of the parties warrants it and it comes within the meaning of the statute. The grant of power in this act is prospective. *Ib.*
11. JURISDICTION NOT RESTRICTED TO OLD FORMS.—The clause, "suits of a civil nature at common law or in equity," was used in contradistinction to admiralty and criminal cases. It does not restrict the jurisdiction to old and settled forms, but includes all suits in which legal rights are to be ascertained and determined. *Ib.*
12. EXTENDS TO CONDEMNATION ACCORDING TO STATE STATUTE.—Con-

JURISDICTION—*Continued.*

gress has power to clothe the Federal courts with authority to proceed for the condemnation of property in conformity with a particular state statute. *Ib.*

13. ACT OF DECEMBER 21ST, 1871.—It was the intention of Congress in this act to give this court jurisdiction of the condemnation proceedings therein contemplated. *Ib.*
14. CONFLICTING CLAIMANTS.—Though the officers of the government had stated to the owners of the ground the price which the government was willing to give, yet if other parties had liens and claims against the property, which they were not willing to surrender, condemnation proceedings are necessary. *Ib.*
15. PROCEEDINGS—BY WHOM INSTITUTED.—The Secretary of the Treasury being the mere officer of the Government, when proceedings are instituted by him under a special law, they become necessarily proceedings on the part of the United States; and although the petition be filed by the district attorney, it is within not only the spirit but the letter of the acts of Congress. *Ib.*
16. REMOVAL FROM STATE COURTS.—The act of April 20th, 1871, does not authorize the removal of a case from the state courts in every case in which the United States courts would have original jurisdiction. *Gaughan vs. Northwestern Fertilizing Co.*, 485.
17. Congress did not intend by the general words used to extend jurisdiction and to authorize removal, except under the circumstances specified in the several acts. *Ib.*
18. Doubtful jurisdiction not entertained. *Ib.*
19. JURISDICTION IN BANKRUPTCY EXCLUSIVE.—Though the proceedings in the state court may have been within its powers and jurisdiction, yet when the fact of bankruptcy intervenes, the exclusive jurisdiction of this court attaches. *In re Merchants Ins. Co.*, 162.
20. STATE PROCEEDINGS NO OBJECTION TO JURISDICTION.—It is not a valid objection to the jurisdiction of this court that the proceedings in the state court were in accordance with a general statute of the state, and part of its organic law, and that the state court having obtained jurisdiction of the parties and subject matter, this court should not interfere. Such a construction would effectually defeat the operation of the bankrupt law. *Ib.*
21. Nor is it a valid objection that the state statute under which the proceedings were instituted is not an insolvent law. If the fact of insolvency exists, and the corporation is within the provisions of the bankrupt law, this court has exclusive jurisdiction, and the fact that the state law does not purport to relieve the bankrupt from his debts cannot be urged as a reason why the state court should hold the assets and administer the estate. *Ib.*
22. APPOINTMENT OF RECEIVER—ACT OF BANKRUPTCY—The appointment by a state court of a receiver, to take possession of the property and

JURISDICTION—*Continued.*

assets of the corporation, is "a taking on legal process" within the meaning of the thirty-ninth section of the bankrupt act. *Ib.*

23. A PARTNER CAN FILE PETITION IN BANKRUPTCY EVEN AFTER RECEIVER IS APPOINTED—Bankrupt court has jurisdiction of a petition by one partner to have the firm declared bankrupts, even though proceedings are pending in a state court to wind up the partnership and a receiver had been appointed who had taken possession of the assets. *In re Noonan*, 491.

24. NO ACT OF BANKRUPTCY NECESSARY.—Such a petition being voluntary as to him, it is not necessary that there should be an act of bankruptcy alleged. *Ib.*

25. JURISDICTION NOT ARRESTED BY DISSOLUTION.—A dissolution by the act of all or any of the partners does not put an end to the power of the bankrupt court. *Ib.*

26. So long as any unfinished business, debts, credits, or assets remain, the bankrupt court has jurisdiction, a proper case being made. *Ib.*

27. DECREE—WHEN CONCLUSIVE.—The original judgment or decree of a court having jurisdiction cannot be disturbed in a co-ordinate tribunal nor in a collateral action. *Amory vs. Amory*, 366.

28. The decree of a state court having jurisdiction of a suit and of the parties, is conclusive of the matters determined, and cannot be impeached in the courts of the United States. *Ib.*

29. The circuit courts of the United States are not constituted to review and reverse the proceedings and judgments of state courts. It is the duty of such courts to give full faith and credit to the judicial proceedings and records of state tribunals. *Ib.*

LIBEL.—*See* ADMIRALTY, 13, 23.

LIEN.—*See* ADMIRALTY, 15–20—MECHANICS' LIEN—BANKUPTCY, 69, 70, 73

LIMITATIONS.—*See* CONSTITUTIONAL LAW.

MARITIME LIENS.—*See* ADMIRALTY, 15–20.

MARRIED WOMEN.

1. A MARRIED WOMAN—has the right to sue for personal injuries without joining her husband. *Seymour vs. C., B. & Q. R. R. Co.*, 43.

2. MARRIED WOMEN AS BANKRUPTS—COMMON LAW RULE RELAXED.—The common law rule that a married woman cannot enter into a co-partnership, or make any valid contract, has been much relaxed, and the rule in equity now seems to be that she may hold, control, and dispose of her separate property, incur liabilities on the strength of it, and that it may be subjected to the payment of her debts contracted in or about the management, improvement, or purchase of such property. *In re Kinkead*, 405.

3. ILLINOIS RULE.—In Illinois, a married woman retains control of all the property, real or personal, which she had at the time of her marriage, or acquired thereafter from any person other than her

MARRIED WOMEN—*Continued.*

husband, and may make contracts in regard to the same, which can be enforced either at law or in equity, to the same extent as if she were sole. *Ib.*

4. MAY ENGAGE IN TRADE.—She may also engage in trade with her husband's consent; and *it seems*, even without such consent, using her own property, and may bind herself by all contracts she makes in her business. *Ib.*
5. BE A PARTNER—EVEN WITH HUSBAND.—She may enter into a co-partnership, even with her husband. *Ib.*
6. CONTRIBUTE HER SHARE.—Where a man and his wife held themselves out to the world as partners in trade, it will be presumed, in the absence of proof, that she contributed her share of the capital, and that her time, skill, and earnings went into the business. *Ib.*
7. PARTNERSHIP CREDITORS FIRST PAID.—When, in such case, the firm become bankrupt, the partnership creditors are entitled to be paid out of the partnership assets in preference to an individual creditor of the husband. *Ib.*
8. MAY BE ADJUDGED BANKRUPT.—Such a partnership can be adjudged bankrupts, and *it seems*, the wife may also be individually adjudged bankrupt. *Ib.*
9. A married woman may be a voluntary as well as an involuntary bankrupt. *In re Collins*, 415.

MATERIAL MEN.—*See* ADMIRALTY, 18–20.

MEASURE OF DAMAGES.—*See* ADMIRALTY, 2.

MECHANICS' LIEN.

1. MECHANICS' LIEN UNDER STATE LAW—WHEN ATTACHES.—The lien created by the statute of Wisconsin attaches from the time the building was commenced, or the materials furnished. *In re Cook and Gleason*, 116.
2. PETITION FILED BY LEAVE.—A person claiming a lien should not proceed in the state courts after petition in bankruptcy filed, without leave of this court. The doing so is a contempt, and until discontinuance of such suits the claimants will not be protected by this court. *Ib.*
3. BANKRUPT LAW RECOGNIZES LIENS.—The Bankrupt Act provides for the protection of legal liens against the bankrupt's estate, instead of destroying them, and where a party has a lien when the petition in bankruptcy is filed, the court in bankruptcy will adjudicate upon and protect it. *Ib.*
4. HOW FAR GOOD.—The lien is only good for the articles actually used in the building, or sold for such use. *Ib.*
5. On a contract not completed when petition was filed a *pro rata* allowance only should be made. *Ib.*
6. Parties having commenced suits in the state courts without such

MECHANICS' LIEN—*Continued.*

consent must discontinue them before they can be paid by the bankruptcy court. *Ib.*

7. NOT FOR WORK DUE AFTER PETITION FILED.—For work done afterwards nothing should be allowed. Parties cannot thus create a lien upon property in the possession of the court. *Ib.*
8. LIEN RELATES BACK.—Under the Mechanics' Lien Law of Wisconsin, the liens relate back to the commencement of the building, without reference to the time when the work was actually done or materials furnished. *In re Hoyt*, 486.
9. PRIORITY.—Such liens take precedence of a mortgage given after the commencement of the work. *Ib.*
10. But as between mechanics there can be no priority. *Ib.*

MILITARY COMMISSIONS.—*See* CONSTITUTIONAL LAW.

MORTGAGE.—*See* FORECLOSURE.

1. DESCRIPTION IN MORTGAGE.—In a contest between mortgagees, the clause creating the lien must prevail. A mortgage of one undivided *fourth* part of certain lands is not to be construed or enlarged by the description as being one undivided *half* part. *Ripley vs. Harris*, 199.
2. The mortgage first recorded is the prior lien. *Ib.*
3. MORTGAGE TO SECURE FUTURE ADVANCES.—Is valid, but it will not secure advances made by the mortgagee after he has actual notice of a subsequent mortgage, in the absence of a contract to make such advances. *Ib.*
4. *It seems*, that where the President of a bank takes in his own name a mortgage to secure loans made by the bank, at his instance, the bank is the creditor of the mortgagor, and also of the President while he holds the securities, and may either hold the President for the debt or compel him to surrender the securities. *Ib.*
5. When the point that a security is invalid as having been taken in violation of the National Banking Act, is not made in the pleadings, it will not be acted upon by the court, although disclosed by the proofs. *Ib.*

MUNICIPAL BONDS.

1. INVALID IF ISSUED TO CONSOLIDATED AND NOT ORIGINAL COMPANY.—County bonds issued to a consolidated railroad company upon a subscription by the county to one of the roads, previous to the consolidation, are illegal and invalid. *Nugent vs. Putnam County*, 105.
2. After the consolidation of the road to aid which the vote was taken, the Supervisors had no authority to issue the bonds. *Ib.*
3. NOT SAVED BY BEING MADE PAYABLE TO ORIGINAL COMPANY.—The validity of the bonds is not preserved by making them in terms payable to the original company. That corporation being dissolved, the legal effect is the same as if they were drawn payable to bearer. *Ib.*

MUNICIPAL BONDS—*Continued.*

4. NOR IF CONSOLIDATED BY CHARTER—Nor does a provision in the charter of the company allowing them to consolidate change the rule. *Ib.*
5. NOR BY FALSE RECITALS.—Though the bonds state on their face that they are issued in pursuance of law, that assertion being untrue, cannot clothe the authorities with power to make the issue. *Ib.*
6. ESTOPPEL.—As against a *bona fide* holder of bonds bearing upon their face the recital that they were issued according to law, it is not a sufficient defense that certain conditions have not been complied with. The town is estopped by the recitals. *Portsmouth Savings Bank vs. Town of Yellow Head*, 474.
7. RESCISSION OF AUTHORITY.—Nor is it a valid defense that after a meeting of the town electors at which a donation was authorized, but before it was formally accepted by the railroad company, the action of the first meeting was rescinded by the town. *Ib.*
8. RATIFICATION BY LEGISLATURE.—It is competent for the Legislature to ratify and confirm issues of bonds previously made, and, *it seems*, to authorize town authorities to issue bonds without a vote of the people. *Ib.*

NATIONAL BANKS.—*See* TAXATION.

NAVIGATION.—*See* ADMIRALTY.

NEGLIGENCE.—*See* ADMIRALTY, 9.

1. RAILWAY CARRIERS—NEGLIGENCE.—Railway companies who are carriers of passengers are required to use all the means reasonably in their power to prevent accident. To render them liable it is not necessary that they should be guilty of great negligence. It is enough if an accident be caused solely by any negligence on their part, however slight, if by the exercise of the strictest care or precaution, reasonably within their power, the injury would not have been sustained. *Seymour vs. C., B. & Q. R. R. Co.*, 48.
2. NEGLIGENCE OF TRAVELER.—But a company, although guilty of negligence, will not be liable if the injury arose from the want of ordinary or proper care on the part of the plaintiff at the time. *Ib.*
3. So, where the accident was caused by the plaintiff's stepping on ice left on the platform in the depot, the company is not liable if the plaintiff, having seen pieces of ice, could, by reasonable care, have avoided stepping on one of them. *Ib.*
4. SAFETY OF PLATFORM.—It is the duty of a railroad company using a platform in a depot belonging to another company to see that the platform used is safe and convenient for passengers to get in and out of the cars regardless of any arrangement with such other company. Whether or not ice was placed on the platform by the company's agents makes no difference if the jury believe that it was

NEGLIGENCE—*Continued.*

dangerous to passengers going to or getting out of the cars—the cars being then open to receive passengers. *Ib.*

5. The agents of the company, by opening the doors of the cars, notified passengers to enter them, and, in fact, notified them that the platform was safe and free from obstructions for those who had purchased tickets. *Ib.*
6. CONTRIBUTORY NEGLIGENCE.—The plaintiff was obliged to use ordinary care and prudence in descending the steps and landing on the platform, and if at any moment it would have appeared to a reasonably prudent person that there was risk of danger to herself in proceeding, then, if she did proceed, it was at her own peril, even though the defendant was guilty of negligence. *Ib.*
7. But if, on the other hand, taking all the circumstances of the situation together, there would not have appeared to a reasonably prudent person any danger in descending the steps and going on the platform, then she cannot be said to have been guilty of contributory negligence, though in fact injury followed what she did. *Ib.*
8. WHAT JURY MAY CONSIDER.—The jury may take into consideration the degree of light, the time of day, the fact that the plaintiff saw the pieces of ice, and if so, the position she occupied when she first saw them. *Ib*
9. DAMAGES.—The jury can only give as damages compensation for the injury, and cannot add anything by way of punishing the defendant. *Ib.*
10. A MARRIED WOMAN,—has the right to sue for personal injuries without joining her husband. *Ib.*

NOTES AND BILLS.—*See* MUNICIPAL BONDS.

NOTICE.—*See* BANKRUPCY, 66, 67, 112, 121.

PARTIES.—*See* JURISDICTION.

PARTNERSHIP.—*See* BANKRUPTCY, 38–40, 44–46—MARRIED WOMEN.

1. A man who buys and ships for a firm in another city, whose funds are used, the profits or loss to be divided, and each shipment to be a distinct venture, is not a partner, and the firm can sustain a libel on a policy indorsed to them, without prejudice from his orders or mistakes. *Marsh vs. Northwestern National Ins. Co.*, 351.
2. SECRET PARTNERS.—In order to charge a secret partner for the debts of the firm, it is necessary to show that such debts were contracted in the name and business of the firm, or that he had an interest in the contract or profits. *In re Munn*, 442.
3. Where the purchaser of a note did not know that there were any secret partners with the persons whose names appeared upon its face, and for whose individual benefit it was given, and placed the proceeds to the credit of the holder, the secret partner would not be liable. *Ib.*

PARTNERSHIP—*Continued.*

4. The fact that such purchaser afterwards proved his claim in bankruptcy against the signers of the note alone goes to show that he understood them alone to be liable, and discounted it upon their responsibility. *Ib.*
5. Where firms composed of different members were doing business under the same firm name, circumstances stated under which dormant partners may not be liable. *Ib.*
6. SECRET PARTNERS—WHEN LIABLE TO ADJUDICATION OF BANKRUPTCY.—A secret partner, known to the petitioning creditors to be such at the time the indebtedness was incurred, and a guarantor on the commercial paper, the nonpayment of which constituted the alleged acts of bankruptcy, may, although entirely solvent, and having personally committed no acts of bankruptcy, be adjudged a bankrupt, on petition filed against both partners. *In re Ess and Clarendon*, 301.

PASSENGERS.—*See* RAILROADS.

PATENTS.

1. BALANCE OF TESTIMONY.—As a general rule the positive testimony of witnesses as to the existence of prior mechanism must outweigh merely negative proof. *Sayles vs. Chicago & N. W. R. R. Co.*, 52.
2. PRESUMPTION FROM NON-USER.—The great utility of an invention being conceded, the fact that if used at all it was on a single car for some years, seems, unexplained, conclusive evidence against its existence. *Ib.*
3. A man should not be deprived of the results of a successful effort merely because some one else has come near it. *Ib.*
4. If it be asked how often a mechanism shall be used to antedate a patented invention, the answer is, until that which is claimed as new in the patent is complete, although the thing may have been imperfect as an instrument or a machine. *Ib.*
5. If it were manifest that the thing claimed in the patent were accomplished, one prior use would be sufficient to defeat the patent. *Ib.*
6. If the construction of the thing itself demonstrates that it was within the principle of the patented invention, then, perhaps, no use of a prior device would be sufficient to destroy the novelty of that which was patented. It might then be said to prove itself. *Ib.*
7. In most cases, sufficient prior use must be shown to prove that the mechanism will accomplish what is claimed, and while this is true of a patented device, it is equally true of that by which a patent is sought to be defeated. *Ib.*
8. PATENTEES MAY SUPPRESS COMBINATIONS; EQUIVALENTS.—Inventors of a combination are as much entitled to suppress every other combination of the same ingredients to produce the same results, not substantially different from what they have invented and caused to be patented, as any other class of inventors; and they have a right

PATENTS—*Continued.*

to invoke the doctrine of equivalents to that extent to sustain their invention. *Ib.*

9. COLORABLE ALTERATION—HOW DECIDED.—It must always be very much a matter of judgment to the eye, in the examination of two machines, and in observing their mode of operation, whether the one, in the whole, or any of its parts, is a mere colorable or formal alteration of the other. *Ib.*

10. USING INVENTION TO ACCOMPLISH FURTHER IMPROVEMENT IS INFRINGEMENT.—If a patentee has invented a combination of two or more old things so as to produce a new and useful result, then he has the right to treat as infringers all who have used his invention in order to accomplish something more or better, when, without the aid of such invention, it could not be affected. *Ib.*

11. TANNER BRAKE CONSTRUED.—The principle of the Tanner brake, as invented by Bachelder & Thompson, and as patented, is the combination of the two series of brakes, (counting the brakes at each end of the car as a series,) with each other and with the windlass at each end, so that all the brakes can be applied at once at either end, by the brakeman. *Ib.*

12. Batchelder & Thompson were the first to successfully make this combination. *Ib.*

13. CADWOOD PATENT HELD VALID.—Letters patent granted to Joseph D. Cadwood, September 9, 1856, for an "improvement in repairing railroad bars," examined and sustained, as being both new and useful. *Turrill vs. Illinois Central R. R. Co.*, 66.

14. The use by the defendants of the invention patented is evidence of its utility. *Ib.*

15. UNSUCCESSFUL COMBINATIONS.—Combinations of similar elements, which could not be *successfully* used to produce the effect produced by the patented machine, do not anticipate the patent. *Ib.*

16. A modification of the parts of a combination by which a new result is obtained may be the subject of letters patent. *Ib.*

17. *The Cawood patent* for an improvement in anvil or swag-block for welding railroad bars construed and held valid. *Turrill vs. Illinois Central R. R. Co.*, 72.

18. The effect of removing the whole or a part of the anvil considered. *Ib.*

19. VALUABLE PATENT—NOT INVALIDATED BY LOOSE TESTIMONY.—A patent for a valuable machine should not be invalidated by the uncorroborated testimony of a single witness, stating that he saw a similar machine in operation in a large city twenty-two years previously. *Blake vs. Eagle Works Manfg. Co.*, 77.

20. VARYING MODE OF CONNECTION DOES NOT ESCAPE INFRINGEMENT.—The patentee having produced important results by the combination of the various parts of his invention, varying the mode of con-

PATENTS—*Continued.*

nection without changing the principle, does not escape infringement. *Ib.*

21. Letters patent for "improved machine for breaking stone," re-issued to Eli W. Blake, January 9, 1866, examined and sustained. *Ib.*
22. The patent for bottle stopper fastener, granted to Henry W. Putnam, March 15th, 1859, and re-issued January 19th, 1864, construed and held valid. *Putnam vs. Hickey*, 157.
23. Other similar inventions commented on and held not to affect it. *Ib.*
24. REMOVABLE GLOBE LANTERN—CHANGING POSITION OF PARTS.—To change the relative position of the parts of a mechanism is not patentable, where no different or additional function is performed. *Dane vs. Illinois Manfg. Co.*, 374.
25. Neither is such a change entitled to greater favor because one of the parts thus transposed is made to perform an additional function, if a similar device has been made before to serve the same purpose in the same situation. *Ib.*
26. A patent for removing from the bottom of a lantern certain devices by means of which it could be separated, and the globe taken out below, and placing them at the top so that the globe could be taken out above, cannot be sustained, although a disc ring which closes the opening between the parts is thereby made to reflect the light downward, such reflection having been well known. *Ib.*
27. It is no infringement to use those elements of a patented combination in which the patentee has no exclusive property, in combination with other elements, if different results are thereby obtained. *Ib.*
28. REMOVABLE GLOBE LANTERN.—Waters' patent for a removable globe lantern construed and held invalid. *Dennis vs. Cross*, 389.
29. Spring catches having been used for fastening the oil pot in the bottom of lanterns, are old, and not patentable for the purpose of fastening the upper and lower parts of a lantern, which, being separated, allow the removal of the globe. *Ib.*
30. *It seems*, that although the claim described the use of catches and lips for fastening the two parts of the lantern, the inventor might use either alone. *Ib.*
31. "GERSTEN" LANTERN DEFLECTOR.—The date of an invention must be taken to be when the application was filed, if it does not appear when the model and drawings were made which show it to have been perfected, although the patentee had previously commenced experiments upon it. *Dane vs. Chicago Manfg. Co.*, 380.
32. Lamps have been well known with chimneys surrounding the flame, and thus promoting combustion, and with deflectors which closed the base of the chimney, and directed the air admitted through apertures upon the flame; and there can be no valid monopoly for enlarging the chimney, so as to form a globe and the deflector so as to close the increased aperture at its base, although the

PATENTS—*Continued.*

glass is thereby removed further from the flame and protected from the heat. *Ib.*

33. How far the globe shall be enlarged, and the chimney removed from the flame, is a question of judgment, and involves no invention. *Ib.*

34. PATENTED METERS—MAY BE PRESCRIBED.—Congress has the right to compel distillers to affix certain meters to their stills as a condition precedent to carrying on their business, whether such meters are patented or not. *Nusbaum vs. Emery*, 469.

35. ABANDONMENT—LACHES.—Non-action during eighteen years on a claim for a patent which had been rejected at the Patent Office constitutes an abandonment to the public. This is true, even though meanwhile a patent for a similar invention had been declared invalid on the ground that this was a prior invention. *Marsh vs. Commissioner of Patents*, 321.

36. It is immaterial whether the rejection of his claim was right or wrong. If he insisted on his claim he should take some action on the subject within a reasonable time, either by an appeal from the Commissioner or by a bill in equity in the proper court. *Ib.*

37. The simple allegation in a bill in equity, under section 52 of the Patent Act, that the inventor did not abandon his claim to the public, is not enough to rebut the presumption to the contrary arising from the state of facts shown in the bill. *Ib.*

38. The 35th section of the patent act of July 8th, 1870, is to be construed with the implied limitation that the applicant had not previously, by abandonment or surrender, lost his rights. *Ib.*

39. This proviso was not intended to restore what had been voluntarily given to the public, or what had become the property of the public by the neglect or refusal for a series of years to prosecute what was originally a valid claim. *Ib.*

PLEADING.—*See* MARRIED WOMEN.

POLICY.—*See* INSURANCE—

PRACTICE.—*See* BANKRUPTCY, 2, 3, 5, 6, 43, 71, 78–84, 88, 118, 134—CONDEMNATION. REMOVAL FROM STATE COURTS.

1. BURNT RECORDS.—The proceedings to restore records in the United States courts must conform to the act of Congress, and not to the State statute. *Turner vs. Newman*, 307.

2. THE ACT OF JUNE 1ST, 1872,—abrogated all rules of this court inconsistent with the state practice in common law cases, and required the United States Circuit and District Courts to conform to such practice in all cases where practicable. *Republic Ins. Co. vs. Williams*, 370.

3. No discretion is left except as to how near it is possible to follow the state practice. *Ib.*

4. UNIFORM SYSTEM OF PRACTICE WITH STATE COURTS.—Congress intended to remove the double system of practice, pleading and

PRACTICE—*Continued.*

proceeding, and establish a uniform system which members of the bar could follow in either court. *Ib.*

5. GOVERNED BY STATE LAWS AND DECISIONS.—The regularity of proceedings should be decided by the state laws and the decisions of the state courts there. *Ib.*
6. OPENING JUDGMENT BY DEFAULT.—In Wisconsin, to open a judgment by default, a copy of the proposed answer, an affidavit excusing the default and an affidavit of merits, must, in all cases, be recorded. *Ib.*
7. LIBEL AGAINST DOMESTIC VESSELS.—Under the twelfth rule in admiralty, as amended by the Supreme Court at the December Term, 1871, a libel can be maintained for repairs and supplies furnished to a domestic vessel at the home port. *The Belt*, 344.
8. MORTGAGEE MAY DEFEND.—In the absence of the owner, a mortgagee may be permitted to appear as claimant. *Ib.*
9. MEANING OF RULE 12TH.—The alteration of rule 12 was intended to place contracts for repairs and supplies for *all* vessels on an equality as to proceeding in admiralty, not to abrogate the distinction between a domestic contract and a maritime lien. The alteration applies to the character of the process to be used, not to the question of jurisdiction. *Ib.*
10. ADMIRALTY RULES.—The rules established by the Supreme Court are rules of practice, not of decision. *Ib.*
11. CONTESTED CLAIMS — PRACTICE.—The proper practice where the assignee wishes to contest a claim is to ask that the claim be expunged under the 34th rule in bankruptcy. *In re Firemen's Ins. Co.*, 462.

PREFERENCE.—*See* BANKRUPTCY, 19, 37–39, 44, 83–84.

PRESCRIPTION.—*See* DEDICATION.

PRINCIPAL AND AGENT.

1. SALE TO ATTORNEY—WHEN VALID.—To set aside a conveyance made by a party in embarrassed circumstances to his attorney, it must be shown that he had been consulted in regard to the particular transaction, or that he was in a position to take an unfair advantage. *Jenkins, Assignee, etc., vs. Einstein*, 128.
2. The fact that their relations were intimate and that the vendor expected to be able to re-purchase on favorable terms, does not make the conveyance a simple security for indebtedness. *Ib.*
3. DEPRECIATED NOTES.—The fact that a part of the consideration was the paper of the firm to which vendor belongs, which was then only worth a part of its face, does not, at common law, vitiate the transaction. *Ib.*
4. LOOSE CONVERSATIONS.—Loose conversations or statements should not be allowed to change the character of a conveyance, and sub-

PRINCIPAL AND AGENT—*Continued.*

sequent parol promises by the vendee to give the vendor the advance in the property, and offers to convey to any one who would take it off his hands, are without consideration and cannot be enforced either in law or equity. *Ib.*

PROOF OF DEBT.—*See* BANKRUPTCY, 125–138.

RAILROADS.—*See* NEGLIGENCE.

RAILROAD BONDS.—*See* MUNICIPAL BONDS.

RATIFICATION.

RATIFICATION BY LEGISLATURE.—It is competent for the Legislature to ratify and confirm issues of bonds previously made, and, *it seems*, to authorize town authorities to issue bonds without a vote of the people. *Portsmouth Savings Bank vs. Town of Yellow Head*, 474.

REAL ESTATE.—*See* MORTGAGE—DEDICATION—CONDEMNATION—FORECLOSURE.

1. SECOND TAX SALE—POSTPONES DEED.—Under the statute of Illinois, if the purchaser at tax sale allows the land to be again sold, within two years, whether for the same class of taxes or for other taxes properly assessed, his right to a deed is postponed, and a deed obtained within the limitation from the second sale is void and inoperative. *Denike vs. Rourke*, 39.
2. MUNICIPAL TAXES, are levied under the same general authority as state and county taxes, and a sale by municipal authority is essentially a sale by state authority. *Ib.*
3. In claiming title under a tax deed, the purchaser, having served a notice upon the person in whose name the land was taxed, as required by Sec. 4, Art. 9, of the Constitution of Illinois, must show affirmatively by proof that such person, at the time of such service, resided in the county where the land is situated. *Ib.*
4. Constitutional provisions for the protection of tax-payers must be strictly construed. *Ib.*
5. RECITALS.—An owner of land is bound by all recitals in his chain of title, and where in a deed made by an administrator he conveys in that capacity, a purchaser receives the title with full knowledge of the trust. *Rafferty vs. Mallory*, 362.
6. Such purchaser acquires no title, and the heirs at law can recover the property. *Ib.*

RECEIVER.—*See* BANKRUPTCY, 8, 135.

RECORDING.

1. PLAT RECORDED IN WRONG COUNTY.—A plat made out and recorded in a different county from where the land is situate does not operate as a dedication. *Nelson vs. City of Madison*, 244.
2. PLAT MUST BE BY OWNER.—The plat must be made by the person who owns the land at the time it is made, or his authorized agent;

RECORDING—*Continued.*

and in order to devest the title of the prorpietor, the formalities prescribed in the statute are essential. *Ib.*

3. Deeds referring to a plat, but given before the grantor acquired title, do not bind him as an act of dedication. *Ib.*
4. But an unequivocal recognition of the map after purchase would operate as an affirmance of the original intention of dedication, and give it full force and effect. *Ib.*

RE-INSURER.—*See* INSURANCE.

REMOVAL FROM STATE COURTS.

1. NO JURISDICTION BY STIPULATION.—This court will not entertain jurisdiction of a case brought up by stipulation of parties from the state court, unless the records show the existence of the facts contemplated by the acts of Congress concerning removals from state courts. *Kingsbury vs. Kingsbury*, 60.
2. APPLICATION FOR REMOVAL—WHEN TO BE MADE.—Under the act of 1789, the removal can only be made on application of the defendant at the time of entering his appearance in the state court. *Ib.*
3. *It seems* that where a case has gone to decree in the state court it is too late for any of the parties to remove it to this court. *Ib.*
4. MINOR CANNOT CONSENT TO REMOVAL.—A minor is incapable of consenting to a change of forum. The state court having obtained jurisdiction of his person and property, neither his guardian *ad litem* nor any other person for him can consent to a removal. *Ib.*
5. The act of April 20th, 1871, does not authorize the removal of a case from the state courts in every case in which the United States courts would have original jurisdiction. *Gaughan vs. Northwestern Fertilizing Co.*, 485.
6. Congress did not intend by the general words used to extend jurisdiction and to authorize removal, except under the circumstances specified in the several acts. *Ib.*
7. Doubtful jurisdiction not entertained. *Ib.*
8. CASES REMOVED—TRIED UPON ORIGINAL PLEADINGS.—An action removed after issue joined, from the state to the Federal courts, under the act of July 27, 1866, as amended by the act of March 2, 1867, must be tried in the Federal courts upon the pleadings certified from the state courts, and the same force and effect must be given to them by the Federal courts as in the state courts if the case had remained there. *Akerly vs. Vilas*, 332.
9. ALL RIGHTS AND DEFENSES PRESERVED.—In such a case the cause stands in the Federal courts as it stood in the courts of the state, the former clothed with the powers of the state courts, and all rights acquired by, and all defenses allowed under the state laws are to be recognized in this court. *Ib.*
10. Congress did not intend, by these statutes to allow either party to

REMOVAL FROM STATE COURTS—*Continued.*

obtain a practice or ruling more favorable to them, or when dissatisfied in the state court to obtain a trial *de novo*. *Ib.*

11. NOT AFTER TRIAL.—Under the act of March 2, 1867, for the removal of causes from state to federal courts, a party whose case has been tried in the state courts and appealed to the Supreme Court of the state, where the decree of the court below was reversed, with instructions to dismiss the suit, has no right to a transfer. *Boggs vs. Willard*, 256.
12. An application comes too late after the issues have been tried in the state courts and a final hearing had. *Ib.*
13. NOT TO OBTAIN REHEARING.—It was not the intention of Congress that a party dissatisfied with an adjudication in the state courts should have the right to remove the cause into the federal courts and there have a rehearing. *Ib.*
14. If the case is such an one as to give the party a right to a writ of error to the Supreme Court of the United States under the 25th section of the Judiciary Act, a review may be had in that manner, but in no other. *Ib.*

REVENUE LAWS.

1. DISTILLER CANNOT RECOVER MONEY DEPOSITED FOR PATENT METERS.—A distiller cannot recover from the collector money which he had deposited with him to pay for the patented meters for his distillery prescribed by the internal revenue department. *Nusbaum vs. Emery*, 469.
2. DUTY OF COLLECTOR.—Upon receipt of meters he should transmit the deposits to the patentee; and he is not liable to the distiller. He is a mere stakeholder. *Ib.*
3. PRESUMPTION THAT REGULATIONS WERE FOLLOWED.—Where a plea does not distinctly either allege or deny that the regulations were followed, the court, on general demurrer, will presume that they were. *Ib.*
4. PATENTED METERS—MAY BE PRESCRIBED.—Congress has the right to compel distillers to affix certain meters to their stills, as a condition precedent to carrying on their business, whether such meters are patented or not. *Ib.*
5. DISTILLER—WHEN ESTOPPED.—The government having prescribed the terms upon which a person can engage in the business of distilling, a person having accepted those terms and entered upon the business, cannot afterwards question their binding force. *Ib.*

SECRET PARTNERS.—*See* PARTNERSHIP.

SET OFF.—*See* BANKRUPTCY, 146–157.

STATUTES OF THE UNITED STATES.

The following, among others, commented on and construed:

Judiciary Act of 1789. *United States vs. Block* 121, 208; *Kingsbury vs. Kingsbury*, 60.
March 3, 1863. *Milligan vs. Hovey*, 13.
Statute of Limitations of 1863. *Milligan vs. Hovey*, 13.
National Currency Act of June 2, 1864. *Union National Bank vs. City of Chicago.*
March 2, 1867. *Kingsbury vs. Kingsbury*, 60; *Akerly vs. Vilas*, 332.
July 20, 1868. *Nusbaum vs. Emery*, 469.
February 28, 1871. *The Lac La Belle*, 313.
April 20, 1871. *Northwestern Fertilizing Co. vs. Town of Hyde Park*, 480; *Gaughan vs. Northwestern Fertilizing Co.*, 485.
December 21, 1871. *United States vs. Block* 121, 208.
June 1, 1872. *Republic Ins. Co. vs. Williams*, 370.

STOCKHOLDER.

1. Liability of Stockholder for Unpaid Balances.—In an action by the assignee of a corporation organized under the Illinois statutes against a stockholder, to recover the amount unpaid on his stock, it is not a sufficient defense that the corporate proceedings have not been strictly in accordance with the statute. *Upton, Assignee, etc., vs. Hansbrough*, 417.
2. Increase of Capital.—Where an insurance company has attempted to increase its capital, and filed papers for that purpose, received subscriptions for and sold stock under such increase, and incurred liabilities upon policies of insurance bearing upon their face evidence of such increase, this is sufficient to constitute the company a corporation *de facto*, so that neither it nor its stockholders can object that it is not a corporation *de jure*. *Ib.*
3. Stockholder—When Estopped.—Where, to the public, a company had all the external *indicia* of being a corporation, and legally entitled to exercise the rights and franchises it assumed, a person voluntarily taking stock in such company is not in a position, when sued for the balance due for such stock, for the benefit of creditors of the company, to deny the authority of the company to issue such stock, or his liability thereunder. *Ib.*
4. A provision in the charter requiring the corporation to take securities for their stock to a certain amount does not prohibit it from afterwards selling stock upon other terms, or without security. *Ib.*
5. Court may make Assessment.—A provision in the subscription and the stock certificate, that the balance was to be paid on the call of the directors, *when ordered by a vote of a majority of the stockholders themselves*, does not prevent this power being effectually exercised by this court. *Ib.*
6. Though no assessment or call pursuant to the terms of the subscription was made before proceedings in bankruptcy, this court became

STOCKHOLDER—*Continued.*

vested with all the power and control previously vested in either the chartered officers of the company or stockholders, or both collectively. *Ib.*

7. Fraud by Agents.—The fact that the agents and officers of the company represented to the stockholders at the time of their purchase that no assessments would ever be made, and that the stock was in fact non-assessable, or made other false and fraudulent statements in regard to the condition of the company, are inadmissible as evidence, and constitute no defense as against the creditors of the com pany. *Ib.*

8. Notice Discretionary.—This court having the power to require the stockholders to pay the balance due on their stock, it is discretionary whether it shall exercise it without notice to the stockholders. At all events, in a suit by the assignee against a stockholder such order cannot be reviewed. *Ib.*

9. The fact that the call was for more than was necessary to pay the debts of the company cannot be tried in an action against an individual stockholder. *Ib.*

10. Release of Unpaid Balances not Binding—A resolution passed by the directors of the corporation, releasing the stockholders from the payment of balances unpaid upon the stock, in accordance with which the certificates of stock were stamped non-assessable, is not binding upon parties who had insured without knowledge of its existence. *Ib.*

11. Purchaser of Stock Liable.—The purchaser of a certificate of stock who surrenders it and has one issued to himself, and his own name entered upon the stock books, becomes subrogated to the rights and assumes the liabilities of an original subscriber. *Ib.*

12. Liability of Stockholder—Formal Transfer on Book may be Waived.—A provision in the by-laws of a corporation, requiring transfers of its capital stock to be made upon its books, may be waived by the company, and if waived at the request of a purchaser of the stock, or with his assent, he becomes a stockholder, and directly liable for future assessments. *Upton, Assignee, etc., vs. Burnham*, 431.

13. Mutual Recognition may establish Relation of Stockholder. Slight evidence of mutual recognition of the relation of stockholder may establish the legal position and liability. *Ib.*

14. A purchaser of stock taking an assignment in blank may, nevertheless, be liable for future assessments. *Ib.*

15. Liability of Stockholder for Unpaid Balances.—Under the Illinois statute a stockholder is liable to the creditors of the company for any unpaid balance upon its stock. *Upton, Assignee, etc., vs. Burnham*, 520.

16. Non-Assessable Stock.—Though the words "non-assessable" writ-

STOCKHOLDER—*Continued.*

ten across the face of the stock certificate might constitute a valid contract as against the company, they are not binding as against the assignee. *Ib.*

17. SUBSTITUTION OF STOCKHOLDER.—If the company accepts as a stockholder a person to whom the stock has been transferred in blank, he then becomes liable as a stockholder. *Ib.*

18. PROVISION THAT STOCK IS TRANSFERABLE ONLY ON COMPANY'S BOOKS.—A provision that the stock is transferable only on the books of the company is for the company's protection, and a provision which they can waive, which they do by accepting such transferee. Entering his name by the company upon their books is such waiver as estops them from claiming of the original stockholder. *Ib.*

19. ASSESSMENT BY COURT.—An order of the court requiring each stockholder to pay a call on his stock within a specified time, is binding upon all the stockholders, whether they receive actual notice or not. *Ib.*

20. INTEREST.—A stockholder is liable for interest on the call from the time it was payable. *Ib.*

21. POWER OF BANKRUPT COURT TO ASSESS STOCKHOLDERS.—This court has jurisdiction and power to make a call and assessment against the stockholders in a bankrupt insurance company, on stock held by them, but not paid up. It has all the powers of a court of equity in the premises. *In re Republic Ins. Co.*, 452.

22. The company, while solvent, having bought and retired a portion of its capital stock, this court will not go behind such action of the constituted authorities of the company. Such an act was within their general scope and power, and does not relieve the other stockholders from their liability to calls after the company has been declared bankrupt. *Ib.*

23. CLAUSE IN CHARTER DOES NOT LIMIT POWER OF COURT.—Although the charter of the company gives no right to make a call on the unpaid stock, except in case "of losses exceeding the means of the corporation," this clause should not be construed as limiting the right of the company or court to an assessment for payment of losses only. When the funds are exhausted by losses, an assessment may be made, either to pay debts already contracted or to create a new fund for a business basis. The losses exceeding the means of the company, the liability of the stockholder on his unpaid stock becomes fixed, and whether the balance is to be applied in payment of losses or in payment of other liabilities and expenses does not affect the question. *Ib.*

24. This court also has power to make an assessment, to return unearned premiums, and to pay all claims properly provable against the company, and also the expense of closing its affairs. *Ib.*

25. EQUALIZATION OF PAYMENTS.—The court also has jurisdiction of the

STOCKHOLDER—*Continued.*

equalization of payments between stockholders; and where part have paid more than their fair proportion, it can assess the others and adjust the account between them. *Ib.*

26. It can also, where equity requires it, allow interest on claims proven. *Ib.*

SUPERVISORS.—*See* MUNICIPAL BONDS.

TAXATION.

1. STATE TAXATION OF NATIONAL BANK SHARES—JURISDICTION OF FEDERAL COURTS.—Under the fifty-seventh section of the National Currency Act of June 2, 1864, suits may be maintained *by*, as well as against, National Banks, in the United States Courts of the district of their location. *Union National Bank vs. City of Chicago*, 82.
2. Though courts of equity will not enjoin the collection of taxes on the *sole* ground of their illegality, the prevention of a multiplicity of suits, or of injury for the redress of which the remedy at law is not so certain, adequate, and complete as in equity, will sustain jurisdiction. *Ib.*
3. SHARES MUST BE ASSESSED AT PAR.—National Bank shares cannot be included in the valuation for taxation by or under State authority at more than the par value thereof; the par value is the fixed value for taxation. *Ib.*
4. The reason is, that under the National Currency Act, as construed by the Supreme Court of the United States, the limited State taxation permitted is one of the conditions annexed to the grant of the franchise, and the shares are subjected to it without regard to the capital, property, or investments of the bank, and, therefore, such taxation is in the nature of a royalty upon the nominal value of the share. *Ib.*
5. TAXES—WHEN VOID.—Such taxation above the par value is not merely an irregularity, but renders the whole tax inoperative and void. Taxes levied in the absence of persons or property, are *ultra vires* and void. Jurisdiction is as essential to valid legislative as judicial action. *Ib.*
6. SHARES.—Shares of stock represent a property interest, separate from the capital and property of the corporation, and, being incorporeal and intangible, are incapable of having an *actual situs*, save at the owner's domicile. *Ib.*
7. STATUTE CONFLICTS WITH STATE CONSTITUTION.—The State law of June, 1867, conflicts with the State Constitution of Illinois, because it directs taxes to be assessed by the authorities of counties, towns, cities, and districts, upon the shares of the banks in the county or town where the bank is located, without regard to the residence of the owner, or the *situs* of the shares. *Ib.*
8. TAXATION NOT UNIFORM IS VOID.—Such taxation, being void as to all

TAXATION—*Continued.*

shareholders not residing in the district where the bank is located, is also void as to those who do reside there. *Ib.*

9. VOID AS TO NON-RESIDENTS.—And if the law be not valid as to residents of the State, the shares of non-residents cannot be taxed under it, as that would be in contravention of the laws of Congress, and the Federal Constitution. *Ib.*

TAX SALE.—*See* REAL ESTATE.

TRAVELER.—*See* NEGLIGENCE.

TRUSTEE.

An administrator who has bid in in his own name property on the foreclosure of a mortgage belonging to his intestate, holds the same for the benefit of the heirs, and cannot sell the same without authority of the court. *Rafferty vs. Mallory*, 362.

USURY.

1. The fact that the negotiator of a loan, who personally guaranteed the paper, received a large compensation for so doing, does not vitiate a conveyance made to him in settlement of a part of the loan which he was afterwards compelled to take up. *Jenkins, Assignee, etc., vs. Einstein*, 128.
2. *It seems* that an assignee cannot set aside a transaction of the bankrupt on the ground of usury. *Ib.*

VENDOR AND VENDEE.—*See* BANKRUPTCY, 66, 69, 77, 78.

WAIVER.

1. NOTE NOT A WAIVER OF LIEN.—A note taken for the amount of the supplies furnished a vessel will not waive a maritime lien on a vessel unless so understood at the time. The note must, however, be returned or surrendered in court at the hearing. *The Eclipse*, 99.
2. LIABILITY OF STOCKHOLDER—FORMAL TRANSFER ON BANKS MAY BE WAIVED.—A provision in the by-laws of a corporation requiring transfers of its capital stock to be made upon its boooks may be waived by the company, and if waived at the request of a purchaser of the stock, or with his assent, he becomes a stockholder, and directly liable for future assessments. *Upton, Assignee, etc., vs. Burnham*, 431.
8. ASSIGNEE CANNOT WAIVE CONDITIONS.—Though an insurance company may, while solvent, waive the performance of conditions, the assignee has no such power. *In re Firemen's Ins. Co.*, 462.
4. EFFECT OF WAIVER BY COMPANY.—A company while solvent may waive the proofs required by the policy, and where there is clear evidence of such waiver shown in the proof of debt in bankruptcy, the debt should be allowed, subject to the right of the assignee to make inquiry into all the facts touching such alleged waiver. *Ib.*
5. If the assured shows such waiver regularly made in good faith by

WAIVER—*Continued.*

the company while it had the right so to do, the assignee should allow the claim, otherwise not. *Ib.*

6. WAIVER OF TIME IN MAKING PROOFS.—Where an insurance company furnished copies of the proofs of loss to a re-insuring company, and no objection was made to their form or substance, the company thereby waive the right to object that they were not furnished in apt time. *Ex parte Norwood*, 504.

7. Objections to proofs of loss must be made by the company on their presentation, or within a reasonable time thereafter, or they will be considered as waived. *Ib.*

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